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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellants

vs.

DEMETRIO P. RODRIGUEZ, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

FILED APRIL 17, 1972
JURISDICTION NOTED JUNE 7, 1972

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PROCEEDINGS

* Courtroom Proceedings

7-30-68	1) Complaint, filed in duplicate. (Copy and notice to Judge Spears)
7-31-68	Summonses as to: Edgewood, Harlandale, Northside, Northeast, Alamo Hgts. and So. San Antonio Independent School Districts and Atty. Gen. of Tex., issued, and S. A. Independent School District.
8- 2-68	2) Summons (S. A. Ind. School Dist.) returned ex. 8-1-68 by Brooks, Deputy.
8- 6-68	3) Summons (Hon. Crawford Martin, Atty. Gen. of Tex.) returned ex. 8-2-68 by Keller, Deputy.
8- 8-68	4) Summons (North East Ind. School Dist.) returned ex. 8-6-68 by Brooks, Deputy.
8- 8-68	5) Summons (Alamo Hgts. Ind. School Dist.) returned ex. 8-6-68 by Brooks, Deputy.
8- 8-68	6) Summons (So. San Antonio Ind. School Dist.) returned ex. 8-6-68 by Brooks, Deputy.
8- 8-68	7) Summons (Northside Ind. School Dist.) returned ex. 8-6-68 by Brooks, Deputy.
8- 8-68	8) Summons (Harlandale Ind. School Dist.) returned ex. 8-7-68 by Brooks, Deputy.
8-12-68	9) Summons (Edgewood Ind. School Dist.) returned ex. 8-8-68 by Madison, Deputy.
8-14-68	10) Motion of Defts. to Extend the Time for Filing Answers, filed dup. (Copy to Judge.)
8-14-68	11) Order Extending Time for Filing Answers, filed. (Mic. Reel No.) Copy to Judge.
8-15-68	All attys. of record notified of Order.
9-30-68	12) Motion of Defts. North East Ind. School Dist., S. A. Ind. School Dist., Harlandale Ind. School District, Northside ISD., Alamo Hgts. ISD., So. S. A. ISD. and Crawford C. Martin, Atty. Gen. for State of Tex. for More Definite Statement, filed in duplicate. (Copy to Judge.)
10- 1-68	13) Answer of Deft., S. A. Independent School Dist., filed dup. (Copy to Judge.)
10- 1-68	14) Answer of Deft., Harlandale Independent School Dist., filed dup. (Copy to Judge.)
10- 1-68	15) Answer of Deft., North East Independent School Dist., filed dup. (Copy to Judge.)
10- 1-68	16) Answer of Deft., Crawford C. Martin, Atty. Gen. of Tex., filed dup. (Copy to Judge.)
10- 7-68	Notices mailed as to Hearing 11-4-68, 10:00 a.m. on Motion for More Def. Statement
10-23-68	17) Answer to Motion for a More Definite Statement, filed dup. (Copy to Judge.)
10-28-68	18) Motion to Issue Order to Show Cause, filed dup. (Copy to Judge.)
10-29-68	19) Order to Show Cause, filed. (Micro. Reel No.) Copy to Judge—all attys. mailed certified copies of Order and notified of cancellation of hearing on 11-4-68.
11- 1-68	20) Motions of Defts. for a More Definite Statement and for Judgment of Dismissal for Failure to State a Claim Upon which relief may be Granted, filed dup. (Copy to Judge.)
11- 1-68	21) Brief in Support of Motion of Deft. Northside Ind. School Dist. for Judgment for Failure to State a Claim upon which relief may be Granted, filed dup. (Copy to Judge.)
11- 1-68	22) Answer of Deft. Northside Independent School District, filed dup. (Copy to Judge.)

11- 1-68 23) Answer of Deft. Alamo Hgts. Ind. School District, filed dup. (Copy to Judge.)

11- 2-68 Notices mailed as to hearing on Motion for More Def. Statement for 11-14-68 at 10:00.

11- 5-68 24) Order Vacating Show Cause Order, filed. (Mic. Reel No.) Copy to Judge and to all attys. of record.

11- 4-68 25) Reply of Deft. Edgewood Independent School District to Order to Show Cause, filed in dup. (Copy to Judge Spears.)

11- 4-68 26) Answer of Deft. Edgewood Ind. School Dist., filed in dup. (Copy to Judge.)

11- 4-68 27) Answer of Deft. So. San Antonio Ind. School Dist., filed in dup. (Copy to Judge.)

11- 8-68 28) Plaintiffs' Interrogatories to Each Defendant School District, filed dup. (Copy to Judge.)

11- 8-68 29) Motion for Extension of Time in Which to Answer Motion of Deft. Northside Ind. School Dist. for Judgment for Failure to State a Claim Upon Which Relief May be Granted, filed in duplicate. (Copy to Judge Spears.)

11- 8-68 30) Brief in Support of Motion of Pltffs. for Extension of Time to Answer Motion of Deft. Northside Ind. School Dist. for Judgment, etc., filed dup. (Copy to Judge.)

11-12-68 31) Brief in Support of Convening Three Judge Federal Court, filed dup. (Copy to Judge.)

11-12-68 32) Answer to Motion for a More Definite Statement, filed in dup. (Copy to Judge.)

11-12-68 33) Answer to Motion to Join Parties Under Rule 19, filed in dup. (Copy to Judge.)

11-12-68 34) Brief Supporting Answer to Motion for a More Definite Statement, filed dup. (Copy to Judge.)

11-13-68 35) Notice to Court of Requirement of a Three Judge Federal Court, filed dup. (Copy to Judge.)

11-14-68 36) Motion of Defts. No. East Dist., S. A. Ind. School Dist., Harlandale, Northside, Alamo Hgts., So. S. A. and Crawford Martin, Atty. Gen., for Additional Time to File Objections to and Answers to the Interrogatories filed by Pltffs., filed dup. (Copy to Judge.)

PROCEEDINGS

11-14-68 * Hearing on Motion for More Definite Statement—Granted—Attys. to submit form of Order to Court for consideration.

11-20-68 37) Order Establishing Timetable, filed. (Mic. Reel No.) Copy to Judge, all attys.

12- 5-68 38) Amended Complaint, filed in duplicate. (Copy to Judge.)

12- 4-68 39) Transcript of Motion for More Definite Statement held 11-14-68, filed.

12-20-68 40) Amended Answer of Deft. Alamo Hgts. Ind. School Dist., filed dup. (Copy to Judge.)

12-23-68 41) Answer of Deft. S. A. Ind. School Dist. to the Amended Complaint, filed dup. (Copy to Judge.)

12-23-68 42) Amended Answer of Deft. Northside Ind. School Dist., filed dup. (Copy to Judge.)

12-23-68 43) Reply Brief of Deft. Northside Ind. School Dist. to Brief of Complainants in Answer to Motion to Join Indispensable Parties Under Rule 19, filed dup. (Copy to Judge.)

12-26-68 44) Amended Answer of Deft. Harlandale Independent School Dist., filed dup. (Copy to Judge.)

12-27-68 45) Amended Answer North East Ind. School Dist., filed dup. (Copy to Judge.)

12-27-68 46) Amendment to Defts. Motion for a Judgment of Dismissal for Failure to State a Claim Upon which relief may be Granted, filed dup. (Copy to Judge.)

12-27-68 47) Supplemental Brief in Support of Defts. Motion to Dismiss for Failure to State a Cause of Action, filed dup. (Copy to Judge Spears.)

1-16-69 48) Motion to Amend Amended Complaint, filed in duplicate. (Copy to Judge.)

1-16-69 49) Brief in Support of Motion to Amend Amended Complaint, filed dup. (Copy to Judge.)

1-17-69 50) Designation Order, filed. (Mic. Reel No. 27) (Designating Judges Spears, Robert and Irving L. Goldberg, Circuit Judge) Copies to all attys. of record mailed.

2-10-69 51) Second Amended Complaint, filed. Copies to Judges Goldberg, Spears and Roberts.

2-10-69 52) Summons issued for James Barlow.

2-12-69 53) Amended Answer of the Defendant. Atty. Gen. of Texas, filed. Copy to Judge.

2-14-69 54) Second Amended Answer of Defendant Alamo Heights ISD, filed. Copy to Judges.

2-17-69 55) Second Amended Answer of Defendant Harlandale ISD, filed. Copy to Judges.

2-17-69 56) Second Amended Answer of Defendant North East ISD, filed. Copy to Judges.

2-17-69 57) Memorandum Regarding Order Appointing Three Judge Court, filed. Copy to Judges.

2-20-69 58) Second Amended Answer of S.A.I.S.D. to the Second Amended Complaint, filed. Copy to Judge Spears.

2-20-69 59) Summons for James Barlow returned ex. 2-18-69 by D/Granados.

2-20-69 60) Motion to Drop Party for Misjoinder, filed. Copy to Judges.

2-24-69 61) Suggestions of the Parties as to the Procedure to be Followed by Three Judge Court, filed. Copies to Judges.

3-10-69 62) Order on Suggestions of the Parties as to Procedure to be followed by the Three-Judge Court, filed. Copy to Judges. (Mic. Reel No. 28)

3-17-69 63) Complainants' Brief on Question of Three Judge Court, filed dup. (Copies to Judges.)

3-24-69 64) Brief of Deft. Northside Ind. School Dist. Upon Question of Three Judge Court, filed dup. (Copies to 3 Judges.)

3-24-69 65) Defts.' Brief on Three Judge Court Issue, filed dup. (Copy to 3 Judges.)

5- 9-69 66) Second Supplemental Brief in Support of Defts.' Motion to Dismiss for Failure to State a Cause of Action, filed. (Copies to 3 Judges.)

5-12-69 67) Order Setting Hearing, filed. (Mic. Reel No.) Copy to Judges and all attys.

5-12-69 68) Order for Case to be Tried by One Judge Instead of Three Judges, filed. (Mic. Reel No.) Copy to Judges and all attys.

5-12-69 69) Opinion, filed. (Mic. Reel No.) Copy to Judges and all attys. of record.

6-11-69 70) Motion to Allow Filing of Outline of Pltffs.' Position, filed. (Copy to Judges.)

PROCEEDINGS

6-13-69 * Hearing on Motion to Dismiss, Motion to Join Parties and Motion to Drop Party Deft.—No decision reached. Case dismissed as to Criminal Dist. Atty. Pltffs. given two weeks to file 3rd Amended Complaint.

6-17-69 71) Transcript of Hearing Before 3-Judge Court held 6-13-69, filed.

6-27-69 72) Third Amended Complaint, filed. (Copies to 3 Judges.)

6-27-69 73) Memorandum Relating to Parties, filed. (Copies to 3 Judges.) Summonses as to: Edgar, Judson, Knowlton, Barley, Engelhardt, Schumacher, Klabunde and Simpson, issued.

7- 8-69 74) Motion of Defts. for Additional Time to File Amended Answers to and Motions to the Third Amended Complaint filed by Pltffs., filed. (Copies to 3 Judges.)

7-11-69 75) Order Extending Time, filed. (Mic. Reel No.) Copy to Judge—all attys. notified.

7-15-69 76) Amended Answer of the Deft. Crawford C. Martin to Pltffs.' 3d Amended Complaint, filed. Copies mailed to 3 Judges.

7-15-69 77) Motion of Deft. Crawford C. Martin for Judgment Upon Pltffs.' 3d Amended Complaint for Failure to State a Claim upon which relief may be Granted, filed. (Copies to 3 Judges.)

7-15-69 Summonses with Third Amended Complaint attached to: Rippy, Evans, Haas, Pool, Howell, Hart, Kirkpatrick, Willborn, Harvey, Jack Binion, Guthrie, Bailes, Corley, Mathews, Morgan, Baird, Koch, Greenwood, Gregg, Seley and Weeks, issued.

7-17-69 78) Answer of Defts. Jack Judson, Lloyd Knowlton, C. O. Barley, Engelhardt, Schumacher, Klabunde and Simpson to 3d Pty. Complaint, filed. (Copy to Judge.)

7-16-69 79) Summons (Jack Judson) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 80) Summons (Lloyd Knowlton) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 81) Summons (C. O. Barley) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 82) Summons (H. W. Engelhardt) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 83) Summons (Geo. Schumacher) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 84) Summons (Benno Klabunde) returned ex. 7-8-69 by Granados, Deputy.

7-16-69 85) Summons (Wayne Simpson) returned ex. 7-8-69 by Granados, Deputy.

7-23-69 86) Summons (James E. Weeks) returned ex. 7-18-69 by Black, Deputy.

7-23-69 87) Summons (Paul R. Haas) returned ex. 7-17-69 by Schorre, Deputy.

7-24-69 88) Summons (Chas. D. Hart) returned ex. 7-17-69 by Beall, Deputy, Bryan, Tex.

7-24-69 89) Summons (Porter M. Bailes, Jr.) returned ex. 7-17-69 by Henderson, Deputy, Tyler, Tex.

7-24-69 90) Summons (E. R. Gregg, Jr.) returned ex. 7-17-69 by Ruthford, Deputy, Jacksonville, Tex.

7-24-69 91) Summons (Vernon Baird) returned ex. 7-18-69 by Vaught, Deputy, Ft. Worth, Tex.

7-25-69 92) Summons (Geo. C. Guthrie) returned ex. 7-24-69 by Madison, Deputy.

7-25-69 93) Summons (Frank M. Pool) returned ex. 7-22-69 by Black, Deputy, San Angelo.

7-30-69 94) Summons (J. W. Edgar) returned ex. 7-28-69 by Keller, Deputy.

7-30-69 95) Summons (Ben R. Howell) returned ex. 7-25-69 by Enriquez, Deputy.

8- 1-69 96) Summons (Winthrop Seley) returned ex. 7-30-69 by McNamara, Deputy.

8- 6-69 97) Answer of Defts. to Pltffs.' Third Amended Complaint, filed. (Copy to Judges—3)

8- 6-69 98) Motion of Defts. for Judgment Upon Pltffs.' Third Amended Complaint for Failure to State a Claim Upon Which Relief May Be Granted, filed. (Copy to 3 Judges.)

8- 6-69 99) Summons (Paul G. Greenwood) returned ex. 7-23-69 by Jones, Deputy, Harlingen, Tex.

8- 6-69 100) Summons (Walter R. Koch) returned ex. 7-29-69 by Keller, Deputy.

8- 6-69 101) Summons (Paul Mathews) returned ex. 7-21-69 by Bozz, Deputy, Greenville, Texas.

8-22-69 102) Motion of the Northside Independent School District That it be Dismissed from this Cause, filed. (Copy to 3 Judges.)

8-22-69 103) Second Amended Answer of Defendant Northside Independent School District, filed. (Copy to 3 Judges.)

8-25-69 104) Third Amended Answer of Deft. Harlandale Independent School District, filed. (Copy to 3 Judges.)

8-25-69 105) Motion of Deft. S. A. Ind. School Dist. to Dismiss the Third Amended Complaint for Failure to State a Claim upon Which Relief may be Granted, filed. (Copy to 3 Judges.)

8-25-69 106) Third Amended Answer of Deft., S. A. Ind. School Dist. to Third Amended Complaint, filed.

8-26-69 107) Motion of Harlandale Ind. School Dist. that it be Dismissed from this Cause, filed. (Copy to 3 Judges.)

8-26-69 108) Third Amended Answer of Deft. Alamo Hgts. Ind. School Dist., filed. (Copy to 3 Judges.)

8-26-69 109) Motion of Deft. Alamo Hts. School Dist. to Dismiss Deft. from Cause for Complainants Failure to State Claim, etc., filed. (Copy to 3 Judges.)

8-26-69 110) Third Amended Answer No. Ea. Ind. School Dist., filed. (Copy to 3 Judges.)

8-26-69 111) Deft.'s Motion to Dismiss No. Ea. Ind. School District, filed. (Copy to 3 Judges.)

9- 4-69 112) Summons (Jack Binion) returned ex. 7-25-69 by Pope, Deputy.

9- 4-69 113) Summons (Richard Kirkpatrick) returned ex. 8-4-69 by Becker, Deputy.

9- 4-69 114) Summons (James W. Harvey) returned ex. 8-6-69 by Vaught, Deputy.

9- 4-69 115) Summons (Edwin L. Rippy, MD.) returned ex. 7-31-69 by Nash, Marshal.

9- 4-69 116) Summons (Herbert O. Willborn) returned ex. 8-6-69 by Bevers, Deputy.

9- 4-69 117) Summons (Wm. H. Evans) returned ex. 8-4-69 by Davidson, Deputy.

9- 4-69 118) Summons (Doyle Corley) returned ex. 8-5-69 by Whiteman, Deputy.

9- 4-69 119) Summons (Carl E. Morgan) returned ex. 8-21-69 by Linthicun, Deputy.

9- 5-69 120) Order Requiring Briefs and Setting Pretrial Conference, filed. (Copies to Judge and all attorneys of record.)

9-11-69 121) Motion for Extension of Time to File Briefs, filed.

9-11-69 122) Order Extending Time to File Briefs, filed. (Copies to Judge and all attys.)

9-12-69 123) Motion for Extension of Time to File Briefs, filed. (Copy to 3 Judges.) (NoSide Ind.)

9-12-69 124) Motion for Extension of Time to File Brief and Memorandum, filed. (Copy to 3 Judges.)

9-15-69 125) Memorandum Brief (Judson, Knowlton, Barley, Englehardt, et al.) filed. (Copy to 3 Judges.)

9-17-69 126) Memorandum Brief of Deft. Alamo Hgts. Ind. School Dist. in Reply to Court's Order of September 5, 1969, filed. (Copy to 3 Judges.)

9-17-69 127) Argument and Authority in Support of Motion of NoSide Ind. School Dist. that it be Dismissed from This Cause, filed. (Copy to 3 Judges.)

9-19-69 128) Memorandum Brief of Defts. Crawford C. Martin, Atty. Gen. of Tex., J. W. Edgar, Comm. of Ed. and the Individual members of St. Bd. of Ed., filed. (Copy to 3 Judges.)

9-19-69 129) Response of Deft. Edgewood Ind. School Dist. to Court's Order of 9-5-69, filed.

9-19-69 130) Memorandum Brief of Deft. No. East Ind. School Dist. in Reply to Order, filed. (Copy to 3 Judges.)

9-19-69 131) Memorandum Brief of Harlandale Ind. School Dist. in Reply to Order, filed. (Copy to 3 Judges.)

9-22-69 132) Memorandum Brief of S. A. Ind. School Dist. Pursuant to Order, filed. (Copy to 3 Judges.)

9-29-69 133) Memorandum Brief of Pltffs. in Response to Order of Court of Sept. 5, 1969, Requiring Briefs, filed. (Copies to 3 Judges.)

10- 2-69 * Hearing on Motion of Independent School Districts to Dismiss, heard and taken under advisement.

10- 8-69 134) Transcript of Hearing of Pretrial Conference held 10-2-69, filed.

10-15-69 135) Order Overruling Motion to Dismiss and Other Matters, filed. (Copies to 3 Judges and all attys. of record)—FM

11-12-69 136) Written Interrogatories, filed. (Copies to 3 Judges.)—fm

12-12-69 137) Order Extending Time, filed. (Copies to Judge and all attys. of record.)—fm

12-12-69 138) Motion for Extension of Time to File Answers to Pltffs.' Interrogatories, filed.

1- 5-70 139) Defts.' Response to Pltffs.' Written Interrogatories, filed. (Exhibits attached)

2-25-70 140) Order as to Progress Being made by Committee, filed. (Copies to 3 Judges and all attys. of record.)—fm

2-27-70 141) Defendants' Report, filed. (Copy to Judge Spears.)

3- 4-70 142) Report to the Court, filed. (Copy to Judge.)

8-17-70 143) Defendants' Report, filed. (Copies to Judges Spears, Roberts and Goldberg.)

9- 4-70 144) Motion to Extend Time for Discovery and Presentation of Pretrial Order, filed.

12- 7-70 145) Order Extending Time, filed. (Copies to 3 Judges and attys. of record.)—fm

2- 9-71 146) Order Extending Time for Further Discovery, filed. (Copies to all judges, attys.)

2-11-71 147) Motion of Defts., Bexar Cnty. School Trustees, to Dismiss Defts. from this Cause for Complnts.' Failure to State Claim Upon Which Relief May be Granted, filed. (Copy to Judge Spears.)

2-25-71 148) Answer to Motion of Bexar County School Trustees to be Dismissed, filed. (Copy to Judges.)

2-25-71 149) Brief Supporting Answer to Motion of Bexar Cty. School Trustees, filed. (Copy to Judges.)

7- 6-71 150) Written Interrog. to Defts., filed. (Copies to Judges.)

7- 9-71 151) Plaintiffs' Answer to Letter of the Court dated July 1, 1971, filed. (Copy to Judges.)

8-24-71 152) Defts.' Answers to Pltffs.' Interrog., filed. (Copies to 3 Judges.)

9- 1-71 ** Discussion in Court and observation by all parties as to suit filed in Tyler involving Edgewood Ind. School Dist.

9- 7-71 153) Motion of NE School District for leave to intervene, filed. (Copy to Judges.)

9- 9-71 154) Pltffs.' Answer to motion of NESD to intervene, filed. (Copies to Judges.)

9- 9-71 155) Brief in Support of Answer to Motion, filed. (Copy to Judges.)

9-15-71 156) Report to the Court, filed. (Copies to Judges.)

9-20-71 157) Order Denying Motion to Intervene, Setting PT Conf., filed. (Copies to Judges, all Exhibits in Vault. Also send notices, etc., to Attys. Langley and Dobbins.)

9-21-71 Notices mailed as to Pretrial Conf. for Tues., Oct. 5th at 10:00 A.M.

9-30-71 158) Motion for Leave to Participate as Amicus Curiae, filed. (Copies to 3 Judges.)

10- 1-71 159) Motion for Leave to Participate as Amicus Curiae, filed. (Copy to Judge Spears.)

10- 5-71 ** Pre-Trial Conference—Order entered—Motions of NoSide Ind. Sch. Dist. and NoEast Ind. Sch. Dist. for Leave to Participate as Amicus Curiae—Granted. Pltffs.' Exhibits 1 through 18 (i) introduced in evidence. 30 days from this date all discovery to be completed and briefs filed. Defts. given 10 days thereafter for filing of briefs.

10- 5-71 160) Pre-Trial Order, filed. (Copies to 3 Judges.)

10-13-71 161) Notice of Taking Deposition, filed. (Copy to 3 Judges.)

10-13-71 162) Interrog. to be propounded to Berke, filed. (Copies to 3 Judges.)

10-15-71 163) Motion to Withdraw as Atty. of Record by Bonham, filed. (Copy to Judge Spears, R & G.)

10-18-71 164) Order allowing withdrawal, filed. (Copies to Judges, Attys. Bonham, Langley, Dobbins, Rivera, Gochman, D.A. Butler, Atty. Gen.)

10-18-71 165) Motion by Harlandale ISD for Leave to Participate as Amicus Curiae, filed. (Copies to 3 Judges.)

10-18-71 166) Order Granting Leave to Participate as Amicus Curiae, filed. (Copies to 3 Judges, all attys. of record.)

10-19-71 167) Motion by Alamo Heights ISD for Leave/Amicus Curiae, filed. (Copies to Judges.)

10-20-71 168) Order permitting AHISD to participate as Amicus Curiae, filed. (Copies to Judges, all attys.)

11- 8-71 169) Plaintiff's Trial Brief, filed. (Copies to 3 Judges.)

11-15-71 170) Defts.' Trial Brief, filed (Copies to Judges.)

11-15-71 Copies of instruments 161-170 to Dobbins (picked up by his office).

11-15-71 Copies of instruments 161-170 (excl. 169) mailed to Langley.

11-15-71 Copies of instruments 166-170 to West (picked up by his office).

11-15-71 Copies of instruments 168-170 mailed to Locke at request of his office.

11-19-71 171) Trial Brief of Amicus Curiae Northside ISD, filed. (Copies to Judges.)

11-19-71 172) Amicus Curiae Brief of Northeast ISD, filed. (Copies to 3 Judges.)

11-22-71 173) Deposition of Joel Berke. (Answers to Interrog., and appendices A & E), filed. (Copies.)

11-22-71 174) Trial Brief of Amicus Curiae Harlandale ISD, filed. (Copies to 3 Judges.)

11-30-71 175) Deposition of Feldstone & Webb, filed. (Copies to 3 Judges.)
11-30-71 176) Deposition of Cardenas, filed. (Copies to Judges.)
12- 1-71 177) Deposition of Leon Graham, filed.
12- 1-71 178) Deposition of Dr. John Stockton, filed.
12- 1-71 179) Deposition of J. W. Edgar, filed.
12- 7-71 180) Deposition of Richard Avena, filed.
12- 7-71 181) Deposition of Dr. Morgan, filed.
12-10-71 *** HEARING on the Merits, concluded. Case taken under advisement. (3 Judge Court.)
12-10-71 182) Written Argument in Lieu of Oral Argument of Northside ISD, filed. (Copies to 3 Judges.)
12-23-71 183) Judgment and Opinion, filed. (Copies to Judges, all attys.)
12-30-71 184) Defts.' Motion for Clarification of Judgment, filed. (Copies to 3 Judges.)
12-30-71 185) Order with Respect to Defts.' Motion for Clarification, filed. (Copies to 3 Judges, all attys. of record.)
1- 3-72 186) Amended Order with Respect to Clarification, filed. (Copies to Judges, all attys.)
1-11-72 187) Application for Leave to File Amicus Curiae (Deatherage, et al.), filed. (Copies to 3 Judges.)
1-11-72 188) Defts.' Brief with Respect to Motion for Clarification, filed. (Copies to 3 Judges.)
1-11-72 189) Suggestions of Amicus Curiae Northeast ISD as to Clarification, filed. (Copies to 3 Judges.)
1-12-72 190) Adoption of Brief for Clarification of Judgment, filed. (Copies to 3 Judges.)
1-12-72 191) Motion of Securities Association for Leave to file a Brief as Amicus Curiae, filed. (Copies to 3 Judges.)
1-13-72 192) Brief of Amicus Curiae Northside Independent School Dist., filed. (Copies to 3 Judges.)
1-20-72 193) Second Application of Securities Ind. for Leave to file Brief, filed. (Copies to 3 Judges.)
1-20-72 194) Motion of North Forest ISD for Leave to file Brief Amicus Curiae, filed. (Copies to 3 Judges.)
1-20-72 195) Plntfs.' Response to Defts.' Motion for Clarification, filed. (Copies to 3 Judges.)
1-20-72 196) Plntfs.' Brief in Response to Defts.' Motion for Clarification, filed. (Copies to 3 Judges.)
1-25-72 197) Defts.' Supplementary Brief with Respect to Defts.' Motion for Clarification of Judgment, filed. (Copies to 3 Judges.)
1-26-72 *** Orders granting leave to file Amicus Curiae Briefs attached to motions for same:
Instrument No. 187: Deatherage, Patterson, Morgan, et al.
Instrument No. 191: Securities Industry Association.
Instrument No. 193: Second Application of Securities Industry Association.
Instrument No. 194: North Forest ISD.
1-26-72 198) Amicus Curiae Motion of Interested Lawyers (Deatherage, et al.), filed. (Copies to 3 Judges.)
1-26-72 199) Brief of Securities Industry Association, filed. (Copies to 3 Judges.)
1-26-72 200) Supplemental Brief of Securities Industry Association, filed. (Copies to 3 Judges.)
1-26-72 201) Brief of North Forest ISD, filed. (Copies to 3 Judges.)
1-26-72 202) Clarification of Original Opinion, filed. (Copies to 3 Judges, all attys of record, and Amicus Curiae attys. Deatherage, Jeffers, Cook w/orders granting leave to file Amicus Curiae Briefs.)

1-26-72 203) Clarification of Original Opinion, filed. (Signatures of all 3 Judges.)

2- 7-72 204) Motion of 4 Banks & SIA for permission to Intervene, filed. (Copies to 3 Judges.)

2- 7-72 205) Brief in Support of Motion for Intervention, filed. (Copies to 3 Judges.)

2- 8-72 Copies of 182, 184, 188, 190, 195, 196, 197, 201, 204, 205 mailed to Amicus Curiae Dobbins, Langley, West, Locke.

2- 8-72 206) Acknowledgment of Service and Consent to Action, filed. (Copies to 3 Judges.)

2- 8-72 *** HEARING on Motion of the Proposed Intervenors for permission to Intervene in Cause. Atty. Clifford Youngblood from Houston given permission to present argument for the proposed intervenors, with the stipulation that he apply for admission to practice in this Court. Statements of Counsel made. Motion of proposed intervenors denied. Proposed intervenors requested transcript of hearing be sent to the other two judges (Goldberg & Roberts) for further consideration of the hearing on this cause.

2- 9-72 207) Transcript of Hearing on Motion to Intervene Held 2-8-72, filed.

2-10-72 208) Request for Review of Denial of Motion for Permission to Intervene, filed. (Copies to 3 Judges.)

2-11-72 209) Order Denying Motion for Permission to Intervene, filed. (Copies to 3 Judges, all attys.)

2-17-72 210) Notice of Appeal to the Supreme Court of the U. S., filed. (Copies to all parties.)

2-23-72 211) Order Denying Request for Review, filed. (Copies to all parties.)—fm.

3-13-72 212) Notice of Appeal to Supreme Court by Republic Natl. Bank, et al., filed. (Copies to Judges, Ct. Reporter, Supreme Court, all attys.)

3-13-72 213) Notice of Appeal to 5th Circuit, filed. (Copies to Judges, NO, all attys, Ct. Rptr.)

3-13-72 214) Transcript of Hearing 12-10-71, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.
v.
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.

(1) Requesting Judge:
Honorable ADRIAN A. SPEARS
Western District of Texas

(2) District Judge:
Honorable JACK ROBERTS
Western District of Texas

(3) Circuit Judge:
Honorable IRVING L. GOLDBERG

(4) Date of Order: Jan. 16, 1969

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge court as this enables a simul-

taneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Misc. No. 1071, Jackson v. Choate, 5 Cir., 1968, — F.2d —, S.D.Fla., — F. Supp. —; Smith v Ladner, S.D. Miss., 1966, 260 F.Supp. 918.

JOHN R. BROWN
Chief Judge, Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

(Title omitted in printing)

THIRD AMENDED COMPLAINT

Complainants for their claim allege:

1. Complainants' basic claim is that their children have been deprived of equal protection of the laws under the Fourteenth Amendment with regard to public school education. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action which arises under the Constitution and laws of the United States, viz.: Amendment Fourteen, §1 of said Constitution, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. The jurisdiction of this Court is further invoked under 28 U.S.C., §1343, this being an action authorized by law to be brought to redress the deprivation under color of statute, regulation, custom, and usage of a state of rights, privileges, and immunities secured by the Constitution of the United States, viz.: Amendment Fourteen, §1 of said Constitution, and §§ 1981, 1983 and 1988 of Title 42, United States Code and the Civil Rights Act of 1964, all of which hereinafter more fully appear.

2. Complainants reside within the boundaries of the Edgewood Independent School District, which is situated within the city limits of San Antonio, a municipality located in Bexar County, Texas. Each of the parent Complainants, who are named below, have children Complainants enrolled in the Edgewood Independent School District, as named below, to-wit:

Parent Complainants:	Children Complainants:
Demetrio P. Rodriguez wife, Belen M. Rodriguez	Alexander Rodriguez
Mrs. Alberta Z. Snid, a widow	Jose Snid Catalina Snid Angelina Snid Selina Snid
Joe Hernandez wife, Carmen D. Hernandez	Joe Hernandez, Jr. Yolanda Hernandez Irma Hernandez Richard Hernandez
Martin R. Cantu, Sr.	Linda Cantu Brenda Cantu Blanche Cantu
Reynaldo F. Castano	James Castano Robert Castano Steve Castano,

except that children Complainants, Elva Marie Rodriguez and Alva Jean Rodriguez, children of Complainants Jose Fermin Rodriguez and wife, Ramona Rodriguez, are in a private school because of the condition of the schools in the Edgewood Independent School District as hereinafter alleged.

3. Complainants sue on behalf of themselves and as next friends of their children. In addition, Complainants bring this suit pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all other school children and parents of school children living in the Edgewood Independent School District who are Americans of Mexican descent and whose numbers make it impracticable to have them joined as Complainants. More than 90% of the children in the Edge-

wood Independent School District are Americans of Mexican descent.

4. Complainants also represent and bring this suit pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all school children who live in the Edgewood Independent School District and all persons in the Edgewood Independent School District who have school children who are similarly situated and whose numbers make it impracticable to have them joined as Complainants.

5. Complainants also represent and bring this suit pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all other school children in independent school districts and all other persons in Texas who have school children in independent school districts who are members of minority groups or are poor and have been deprived of the equal protection of the law under the Fourteenth Amendment with regard to public school education because of the low value of the property lying within the independent school districts in which they reside.

6. Complainants, as members of the classes, can and will adequately and fairly represent all of the members of the classes, who are so numerous as to make it impracticable to bring them all before this Court; that the character of the rights to be enforced and protected for the classes are several; and that there are common questions of law and fact affecting the several rights of all of the classes and a common relief is sought.

7. Defendants:

(a) Complainants sue the State Board of Education and Porter M. Bailes, Jr., M.D., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul

G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Koch, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, and Herbert O. Willborn in their capacity as members of the State Board of Education. The State Board of Education, under Article 2654-3, reviews, evaluates, adopts and promotes plans to meet the educational needs of the public schools within the State of Texas. Under Article 2665, the State Board of Education is in charge of allocation of certain school funds of the State. Under Article 2675b-5, the State Board of Education has the duty to consider the needs of the public schools of the State of Texas and prepare and present a report to the Governor to be transmitted to the legislature upon convening. It is further the duty of the State Board of Education, under said Article, to make statistical studies of education in the State of Texas. Under Article 2922-16, it is the duty of the State Board of Education to estimate the total cost of the Minimum Foundation School Program and to approve assessments for the Minimum Foundation School Program.

(b) Complainants sue J. W. Edgar, individually, and in his capacity as Commissioner of Education. The Commissioner of Education is the executive officer of the State Board of Education. He is responsible, under Article 2654-5, for promoting efficiency and improvement in the public school system of the State. Under Article 2656, he administers the school laws of the State and under Article 2657, he advises school officers. Under Article 2658, he notes the educational progress taking place in the public school system and under Article 2663, he is in charge of distribution of school funds from the State. He is also the executive

officer in charge of administering, subject to the approval of the State Board of Education, the Minimum Foundation Program under Article 2922-16 and 2922-20.

(c) Complainants sue Crawford Martin, the Attorney General of the State of Texas. In his capacity as Attorney General, he has sought to uphold and enforce the laws of the State of Texas, including Title 49 of Vernon's Annotated Civil Statutes of Texas and Article 2806 thereof, and Article 7, §3 of the Constitution of the State of Texas. The Attorney General derives his authority to be chief law enforcement officer of the State and represent the interests of the State in civil litigation by virtue of Article 4, §22 of the Texas Constitution and the common law. Under Article 4399, he is responsible for giving advisory opinions to the Commissioner of Education with regard to laws relating to education and under Article 2670, he is responsible for approving all school bonds in the State.

(d) Complainants sue the Bexar County School Trustees, to-wit: Jack Judson, Lloyd Knowlton, C. O. Barley, H. W. Engelhardt, George Schumacher, Benno Kalbunde and Wayne Simpson. Under Article 2676, these Trustees are the general managers of the public schools of the county. In Bexar County, the authority of the School Trustees is limited since all the schools in the county are in independent school districts. If the Court orders, as alternatively prayed, that a school district or school districts be abolished, it would be incumbent upon the County School Trustees, under Article 2922a, to set the boundary lines of any new school districts that might result.

(e) The Defendant school districts are: San Antonio Independent School District, Edgewood Inde-

pendent School District, Harlandale Independent School District, Northside Independent School District, Northeast Independent School District, Alamo Heights Independent School District and South San Antonio Independent School District.

Each lies wholly or partly within the City of San Antonio and geographically are situated in one continual and contiguous urban complex that comprises the City of San Antonio and its environs (cities having contiguous boundaries with the City of San Antonio). This urban complex is in Bexar County, Texas. Neither cities or counties geographically determine Defendant school district boundaries; no natural geographic reasons exist for their present boundaries; costs do not vary substantially within the area described.

Each of the other Defendant school districts collects and spends substantially more money per student for their education than the Edgewood Independent School District. Therefore, such other Defendant school districts are able to provide a substantially higher quality of education for their students than is Edgewood.

Although the duty to provide education pursuant to the Texas Constitution is a non-delegable function of the State, these school districts are joined as Defendants in their capacity as quasi-municipal corporations set up by the State for the convenience of the State in maintaining public schools. These school districts could be directly affected by the outcome of this case. Complainants pray, as alternative relief, that these school districts be abolished and that the County Board of School Trustees prepare school district boundary lines that will provide the minorities and the poor with approximately equal funds per student in relation to other students.

Said Defendant school districts are sued also under Rule 23 of the Federal Rules of Civil Procedure as representatives of two classes, to-wit: the Independent School Districts of Bexar County, since the members of the classes are so numerous that the joinder of all members is impracticable, and the State of Texas. There are questions of law and fact common to the classes. The defenses of the representative parties are typical of the defenses of the classes and the representative parties will fairly and adequately protect the interests of the classes. Adjudications with respect to the individual members of the classes would, as a practical matter, be dispositive of the interest of the other members not parties to the adjudication and the questions of law and fact common to the members of the class predominate over any question affecting only individual members. A class action is superior to other avaiable methods for the fair and efficient adjudication of the controversy.

8. It is incumbent upon the State to provide funds to support the Texas free public school system. State funds supporting the Texas free school system (the State financing system) come primarily from two sources.

(a) *Taxes Assessed by School Districts:* The State has delegated, in pursuance of Article 7, §3, the power of each school district to levy and collect ad valorem property taxes for maintenance and operation of their respective school systems. Under Article 7, §3, the State requires that each school district, including Defendant districts, without exception, retain in each district all the taxes collected by such district.

(b) *Minimum Foundation School Funds:* The second basic source of revenue from the State in support

of the public free school system is derived from the Minimum Foundation School Program (Articles 2922-11 to 2922-24). The Foundation funds are distributed by the State Commissioner of Education, subject to the approval of the State Board of Education, to the various school districts in the State.

The value of property in the Edgewood District is substantially less per student than in the other Defendant districts and insufficient to bear the burden of equalizing the Edgewood District to the other Defendant districts. Because of the present school financing system of the State, this vast difference in value of property within the districts results in the inequality of funds available for education in the Edgewood District. The low property values and low family incomes preclude the Edgewood District from collecting funds through taxation of property within the district equal per student to the other school districts.

For comparison, the property valuation in the Edgewood District is approximately $2,210 per pupil, while the property valuation in the Northeast Independent School district is approximately $12,090 per pupil. The average family income in the Edgewood District is approximately $3,300, while the average family income in the Northeast Independent School District is between $8,000 and $10,000.

As a result, on information and belief, Edgewood Independent School District spends approximately $290 for the education of each of its students; San Antonio Independent School District spends approximately $385; Northeast Independent School District spends approximately $475; Alamo Heights Independent School District spends approximately $485; Harlandale Independent School District spends approxi-

mately $384; South San Antonio Independent School District spends approximately $370; and Northside Independent School District spends approximately $384. There is no justification for such disparities in terms of educational needs or educational costs.

The sums above include Federal funding in which Edgewood receives more per student than the other Defendant school districts. Thus, the disparities in funds derived from the financing scheme provided under the laws of the State of Texas is greater than shown in the above figures.

9. As a result, the children in the Edgewood District are provided a substantially inferior education compared to the children in other Defendant school districts because, with greater income per student as described aforesaid, other Defendant school districts are able to hire better qualified teachers, more and better counselors, provide better building facilities, scientific equipment, libraries, equipment and supplies, and maintain a broader and better curriculum. The state deprives Complainants of an adequate education and equal opportunity with regard to education.

10. Each district levies and collects taxes on property within its district. The money collected by a district must be used solely within the district in which it is collected under the requirements of Article 7, §3 of the Texas Constitution. Provision is made for consolidation of independent school districts under Article 2806, Vernon's Annotated Civil Statutes of Texas. Such consolidation requires an election in which a majority of those voting in all school districts involved must vote for consolidation in order to effectuate consolidation. Under Article 2742f, upon election, school boundaries of an independent district can also be

changed. Under Article 2922a, if Edgewood District were abolished by election or changed to a different classification of school district, the County Board of School Trustees could annex it to another district. There are the methods under which the boundaries of the Edgewood District could be changed and its per student property values increased. No administrative procedure exists for Complainants to equalize the system. The Complainants have no remedy or right of redress except through court action.

11. Complainants do not allege that a school district system of administering public school education is unconstitutional. Complainants further do not allege that a variance in expenditures would be unconstitutional where the students receiving greater sums of money have educational needs that require greater sums of money. Complainants do allege that in the present case the educational needs of the children in the Defendant school districts, other than Edgewood Independent School District, are not greater and neither require nor justify greater sums of money than the educational needs of the children of the Edgewood School District.

12. The State financing system denies Complainant children and other children within the Edgewood District educational opportunities and resources substantially equal to those enjoyed by children attending other Defendant school districts. It fails to meet minimum requirements of the Fourteenth Amendment of the United States Constitution and Article 1, Sec. 3, of the Texas Constitution in the following respects:

(a) It makes the quality of education received by Complainants and their class a function of the wealth of their parents and neighbors as measured by the tax

rate and property values of the school district in which they reside.

(b) It provides students living in Defendant school districts other than Edgewood School District with material advantages over Complainants and their class in selecting and pursuing their educational goals.

(c) It provides Complainant children and their class, who are of substantially equal age, aptitude, motivation, and ability, with substantially inferior educational resources than children in the Defendant school districts other than Edgewood School District.

(d) It produces and perpetuates the marked difference in the quality of educational services, equipment and other facilities of schools in the school district wherein Complainant children reside and the schools of the Defendant districts.

(e) The use of the "school district" as a unit for the varying allocations of educational funds has no reasonable relation to the Texas constitutional purpose of providing for general diffusion of knowledge by an efficient system of free public schools and/or is not necessary to promote a compelling State interest.

(f) The part of the State financing system which requires Defendant school districts to retain and expend, with their respective boundaries, all of the school taxes collected for the educational purposes of each district bears no reasonable relation to any educational objective.

13. The Complainants are all of Mexican-American descent. The students of the Edgewood District are practically all Americans of Mexican descent. The percentage of Mexican-Americans in the Edgewood School District is higher than in the other Defendant school

districts. As the percentage of Mexican-Americans decrease in a district, the amount spent per student for education increases. In other words, the lower the percentage of Mexican-Americans in a Defendant school district, the higher are the expenditures per student.

There has been a pattern of discrimination against Mexican-Americans in the Southwestern United States (those states having a common border with Mexico, including the State of Texas. Such discrimination has resulted in a generally poorer education, more substandard housing, more limited job opportunities, smaller incomes and more deprivation of civil and political rights for Mexican-Americans than for other white Americans in Texas. Edgewood School District has a very high concentration of Mexican-Americans. Its residents have, on information and belief, lower incomes, more substandard housing, poorer education, and more limited job opportunities than do residents of the Defendant school districts, other than Edgewood School District. The State financing system results in further discrimination and the laws providing for such a scheme are therefore unconstitutional. The discrimination is willful.

14. The people in the Edgewood District have a lower per capita income, a lower mean income, and a lower family income than the people in the other Defendant school districts.

15. The operation of Article 7, Sec. 3 of the Texas Constitution and Title 49 of Vernon's Annotated Civil Statutes of Texas, insofar as it is applicable to Complainants, and the State financing system therein prescribed have deprived Complainants of the equal protection provided for in the Fourteenth Amendment and the equality guaranteed Complainants by Article

1, §3 of the Texas Constitution in that racial discrimination and segregation have resulted from such operation and limits Complainants and their class to more limited job opportunities, lower incomes, and substandard housing in the future.

16. Complainants also claim that the State, in providing for education, must make available and create a system of equal opportunity of education for all its citizens. The duty to provide such an education is a State obligation and school districts are merely subdivisions of the state government organized for convenience in exercising the government function of establishing and maintaining public free schools for the benefit of the people. That the State financing system of numerous independent school districts in the same geographic metropolitan area, providing for separate and independent taxing units, taxing rate, and resulting tax income, allows for the conditions that exist in this case in which there are vast differences in educational facilities and money spent for each student's education. That the system of independent school districts, each taxing separately in different amounts for itself, created through the statutes designated herein, deprives Complainants of equal educational opportunity in violation of Amendment Fourteen of the United States Constitution.

17. An actual controversy has arisen relating to the rights and duties of the parties in that Complainants contend that they have been denied the equal protection of the laws of the United States, and that Article 7, §3 of the Texas Constitution and such other statutes in Title 49 of Vernon's Annotated Civil Statutes of Texas, as conflict with Complainants' constitutional rights, are invalid and unconstitutional. That the Complainants have no other means of remedying the situation

besides resort to this Court because of the State taxing system and the inability of the Complainants to administratively follow a procedure that will provide them relief. That under the Texas laws, Complainants cannot effectuate an equal distribution of the districts since such consolidation as is allowed requires action by the districts themselves and actions by a majority vote in such districts. On the other hand, Defendants contend that Complainants have not been denied equal protection and that Article 7, §3, of the Texas Constitution and Title 49 of Vernon's Annotated Civil Statutes of Texas are valid and constitutional.

18. The injury to Complainant children and to the members of their class as a result of the method of the State financing system is irreparable and the Complainants and the members of their class will continue to be irreparably injured unless the relief requested by this Complaint is promptly granted.

WHEREFORE, Complainants respectfully pray:

A. That the Court declare the respective rights and duties of the Complainants and Defendants and enter judgment declaring:

(1) the Complainants have been denied equal protection of the laws of the United States and Texas by the aforesaid State financing system, and

(2) the State financing system is void and without force or effect as repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and repugnant to Article 1, §3 of the Constitution of the State of Texas, and/or that it is unenforceable insofar as it interferes with providing a system of equal educational opportunity;

B. That Article 7, §3 of the Texas Constitution, Article 2806 of Vernon's Annotated Civil Statutes of

Texas, and the sections of Title 49 of Vernon's Annotated Civil Statutes of Texas relating to the financing of education, including the Minimum Foundation School Program (Articles 2922-11 to 2922-21) being repugnant to the Constitution of the United States, the Defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to said Article 7, §3 of the Texas Constitution, Article 2806 of Vernon's Annotated Civil Statutes of Texas, and sections of Title 49 of Vernon's Annotated Civil Statutes of Texas relating to the financing of education, including the Minimum Foundation School Program Act (Articles 2922-11 to 2922-21), and that Defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

C. That the Court retain jurisdiction in this action, affording Defendants and the legislature of the State of Texas a reasonable time in which to take all steps reasonably feasible to make the school system comply with the applicable law, and without limiting the generality of the foregoing, to re-allocate the school funds and to otherwise restructure the taxing and financing system so as to provide substantially equal public school educational opportunities for the Edgewood Independent School District with those children in the other Defendant school districts and/or for all children of the State of Texas as required by the equal protection clause of the Fourteenth Amendment to the United

States Constitution and Article 1, §3 of the Constitution of the State of Texas, and should the Defendants and the legislature fail to so reapportion school funds within such reasonable time that this Court enter its order regulating the collection of property taxes for school purposes and apportion school funds in satisfaction of the obligations undertaken by the State of Texas in Article 7 of the Texas Constitution and in conformance with the requirements of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States;

D. Alternatively, Complainants pray that the Court order that Defendant school districts in Bexar County be abolished and the County School Trustees convene to establish the new boundary lines for a school district or districts, and that the Court order that the lines be drawn so that the property values in each of the resulting school districts be approximately equal with regard to value of taxable property per school child; and

E. That Complainants be granted such other and further relief as may be proper.

Respectfully submitted,

ARTHUR GOCHMAN
802 Frost Bank Building
San Antonio, Texas 78205

Attorney for Complainants

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

(Title Omitted in Printing)

AMENDED ANSWER OF THE DEFENDANT, CRAWFORD C. MARTIN, ATTORNEY GENERAL OF TEXAS, TO PLAINTIFF'S THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Crawford C. Martin, Attorney General of the State of Texas, one of the Defendants in the above entitled and numbered cause and, in accordance with the order of this Court, files this, his amended answer to Plaintiffs' Third Amended Complaint, and would respectfully show unto the Court as follows:

I.

The Third Amended Complaint of Plaintiffs fails to state a claim against Defendant upon which relief can be granted.

II.

A. Defendant denies the allegations contained in Paragraphs 1, 12, 15, 16, 17 and 18 of Plaintiffs' Third Amended Complaint.

B. Defendant is without knowledge or informtion sufficient to form a belief as to the truth of the allegations contained in Paragraphs 2, 3, 4, 5, 6, 7(d), 11 and 14 of Plaintiffs' Third Amended Complaint.

C. Defendant admits the allegations contained in Paragraph 7(a), 7(b), 7(c) and 8(a) of Plaintiffs' Third Amended Complaint.

D. Defendant admits the allegations contained in the first paragraph of Paragraph 7(e) of Plaintiffs' Third Amended Complaint; Defendant is without knowedge or information sufficient to form a belief as to the truth of the allegations contained in the second and third paragraphs of Paragraph 7(e) of Plaintiffs' Third Amended Complaint; Defendant denies the remaining allegations contained in Paragraph 7(e) of Plaintiffs' Third Amended Complaint.

E. Defendant admits the allegations contained in Paragraph 8 of Plaintiffs' Third Amended Complaint that: "State funds supporting the Texas free school system (the State financing system) come primarily from two sources," but denies the remaining portion of Paragraph 8 of Plaintiffs' Third Amended Complaint.

F. Defendant admits the allegations contained in the first paragraph of Paragraph 8(b) of Plaintiffs' Third Amended Complaint, but the Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 8(b) of Plaintiffs' Third Amended Complaint.

G. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of Plaintiff's Third Amended Complaint, save and except the last sentence thereof, wherein it is alleged that: "the State deprives Complainants of an adequate education and equal opportunity with regard to education," which such allegation the Defendant denies.

H. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of Paragraph 13

of Plaintiffs' Third Amended Complaint, but the Defendant denies the allegations contained in the second paragraph of Paragraph 13 of Plaintiffs' Third Amended Complaint.

I. Defendant admits the allegations contained in all but the last three sentences of Paragraph 10 of Plaintiffs' Third Amended Complaint; as to the allegation that: "these are the methods under which the boundaries of Edgewood District could be changed and its per student property values increased," Defendant is without knowledge or information sufficient to form a belief as to the truth of such allegation; the Defendant denies the allegations contained in the last two sentences of Paragraph 10 of Plaintiffs' Third Amended Complaint.

WHEREFORE, Defendant, Crawford C. Martin, Attorney General of Texas, prays that a judgment be entered in his favor, that the relief prayed for by Plaintiffs be denied, and for its cost, and for such other and further relief which this Court may deem proper.

CRAWFORD C. MARTIN
Attorney General of Texas

PAT BAILEY
Assistant Attorney General
Capitol Station
Austin, Texas 78711

Attorneys for Defendant,
CRAWFORD C. MARTIN,
Attorney General of Texas

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

(Title Omitted in Printing)

ANSWER OF THE DEFENDANTS, STATE BOARD OF EDUCATION, PORTER M. BAILES, JR., M.D., VERNON BAIRD, JACK BINION, DOYLE CORLEY, WILLIAM H. EVANS, PAUL G. GREENWOOD, E. R. GREGG, JR., GEORGE C. GUTHRIE, PAUL R. HAAS, CHARLES D. HART, JAMES W. HARVEY, BEN R. HOWELL, RICHARD KIRKPATRICK, WALTER R. KOCH, PAUL MATHEWS, CARL E. MORGAN, FRANK M. POOL, EDWIN L. RIPPY, M.D., WINTHROP SELEY, JAMES E. WEEKS, HERBERT O. WILLBORN, MEMBERS OF THE STATE BOARD OF EDUCATION, AND J. W. EDGAR, COMMISSIONER OF EDUCATION, TO PLAINTIFFS' THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW State Board of Education, Porter M. Bailes, Jr., M.D., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Koch, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, Herbert O. Willborn, Members of the State Board of Education, and J. W. Edgar, Commissioner of Education, Defendants in the above entitled and numbered cause and file this, their answer to Plaintiffs' Third Amended Complaint, and would respectfully show unto the Court as follows:

I.

The Third Amended Complaint of Plaintiffs fails to state a claim against Defendants upon which relief can be granted.

II.

A. Defendants deny the allegations contained in Paragraphs 1, 12, 15, 16, 17 and 18 of Plaintiffs' Third Amended Complaint.

B. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 2, 3, 4, 5, 6, 7(d), 11 and 14 of Plaintiffs' Third Amended Complaint.

C. Defendants admit the allegations contained in Paragraphs 7(a), 7(b), 7(c) and 8(c) of Plaintiffs' Third Amended Complaint.

D. Defendants admit the allegations contained in the first paragraph of Paragraph 7(e) of Plaintiffs' Third Amended Complaint; Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second and third paragraphs of Paragraph 7(e) of Plaintiffs' third Amended Complaint; Defendants deny the remaining allegations contained in Paragraph 7(e) of Plaintiffs' Third Amended Complaint.

E. Defendants admit the allegations contained in Paragraph 8 of Plaintiffs' Third Amended Complaint that: "State funds supporting the Texas free school system (the State financing system) come primarily from two sources," but deny the remaining portion of Paragraph 8 of Plaintiffs' Third Amended Complaint.

F. Defendants admit the allegations contained in the first paragraph of Paragraph 8(b) of Plaintiffs'

Third Amended Complaint, but the Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 8(b) of Plaintiffs' Third Amended Complaint.

G. Defendants are without knoweldge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of Plaintiffs' Third Amended Complaint, save and except the last sentence thereof, wherein it is alleged that: "the State deprives Complainants of an adequate education and equal opportunity with regard to education," which such allegation the Defendants deny.

H. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of Paragraph 13 of Plaintiffs' Third Amended Complaint, but the Defendants deny the allegations contained in the second paragraph of Paragraph 13 of Plaintiffs' Third Amended Complaint.

I. Defendants admit the allegations contained in all but the last three sentences of Paragraph 10 of Plaintiffs' Third Amended Complaint; as to the allegation that: "these are the methods under which the boundaries of Edgewood District could be changed and its per student property values increase," Defendants are without knowledge or information sufficient to form a belief as to the truth of such allegation; the Defendants deny the allegations contained in the last two sentences of Paragraph 10 of Plaintiffs' Third Amended Complaint.

WHEREFORE, Defendants pray that a judgment be entered in their favor, that the relief prayed for by

Plaintiffs be denied, and for their costs, and for such other and further relief which this Court may deem proper.

CRAWFORD C. MARTIN
Attorney General of Texas

PAT BAILEY
Assistant Attorney General

Capitol Station
Austin, Texas 78711

Attorneys for Defendants

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

(Title Omitted in Printing)

MOTION OF DEFENDANTS, STATE BOARD OF EDUCATION, PORTER M. BAILES, JR., M.D., VERNON BAIRD, JACK BINION, DOYLE CORLEY, WILLIAM H. EVANS, PAUL G. GREENWOOD, E. R. GREGG, JR., GEORGE C. GUTHRIE, PAUL R. HAAS, CHARLES D. HART, JAMES W. HARVEY, BEN R. HOWELL, RICHARD KIRKPATRICK, WALTER R. KOCH, PAUL MATHEWS, CARL E. MORGAN, FRANK M. POOL, EDWIN L. RIPPY, M.D., WINTHROP SELEY, JAMES E. WEEKS, HERBERT O. WILLBORN, MEMBERS OF THE STATE BOARD OF EDUCATION, AND J. W. EDGAR, COMMISSIONER OF EDUCATION, FOR JUDGMENT UPON PLAINTIFFS' THIRD AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW State Board of Education, Porter M. Bailes, Jr., M.D., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Koch, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, Herbert O. Willborn, Members of the State Board of Education, and J. W. Edgar, Commissioner of Education, Defendants in the

above entitled and numbered cause, and would show to the Court that the Complainant herein fails to state a claim upon which relief can be granted for the following reasons:

1. That Plaintiffs have failed to allege a cause of action arising under the Constitution or laws of the United States.

2. That Plaintiffs do not allege that either Article VII, Section 3, of the Texas Constitution or Article 2806 of the Revised Civil Statutes, or the Minimum Foundation School Program (Arts. 2922-11 to 2922-24), were enacted for the purpose of denying to any person the equal protection of the laws or to abridge the privileges or immunities of any citizen or to deprive any person of life, liberty or property without due process of law.

3. That Article VII, Section 3, of the said Constitution shows on its face that it was enacted to provide for a public free school system for *all* of the children of the State. Said constitutional provision provides for State funds for the maintenance of all schools within the State for a period of not less than six months each year and for free text books to all students and, in addition thereto, grants the power to all school districts to levy additional taxes for the further maintenance of the public free schools and for the erection and maintenance of buildings in such districts.

4. That no violation of Amendment XIV of the Constitution of the United States results from the fact that the State of Texas is divided into numerous common and independent school districts, each of which varies from the other in the amount of total funds available for school buildings and the further maintenance of the schools within its limits by virtue of the

respective will or ability of their respective inhabitants to vote higher school taxes and correspondingly higher encumbrances on their properties than inhabitants of another district or other districts.

5. That no violation of the Constitution of the United States results from the fact, if true, that each of the Defendant school districts collects and spends substantially more per student for the education of the children residing therein than does Edgewood Independent School District.

6. That no violation of the Constitution of the United States results from the fact, if true, that each of the Defendant school districts is able to provide a substantially higher quality of education for its students than Edgewood Independent School District.

7. That it is nowhere alleged that the independent school district system of Texas was created for the purpose of discriminating against Mexican Americans because of their race.

8. That the Constitution of the United States does not require that all states must spend substantially equal sums for the education of the children of their respective citizens, nor does it require that each city in each state spend substantially the same amount for the education of the children of its citizens, nor that each school district in each state spend substantially the same amount of money for the education of the children of the inhabitants thereof.

9. That inequality of wealth has always existed between the citizens in various states, regions, communities, and areas within communities, and has always resulted in the fact that in some areas it has been feasible to levy and collect higher taxes than in others for all purposes, including education.

10. That the Fourteenth Amendment of the Constitution does not require that the money collected from ad valorem tax levies on real and personal property of one school district be expended in part for the education of children living in another school district which, for some reason or other, failed to levy or collect taxes equal to those collected by the other district.

11. That it is not alleged in Plaintiffs' petition that an effort has been made to levy and collect taxes within Edgewood Independent School District equal to the effort made by the Defendant school districts.

12. Plaintiffs' Third Amended Complaint constitutes nothing more than an effort on Plaintiffs part to make the naked allegations that their rights have been violated under the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964, suffice for factual allegations to support Plaintiffs' vague and general allegations. Such action on the part of the Plaintiffs leaves the Defendants and this Court in the position of having to speculate as to how or in what manner the Plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 have been violated.

WHEREFORE, PREMISES CONSIDERED, these Defendants pray that judgment be entered herein that Plaintiffs take nothing herein against these Defendants.

CRAWFORD C. MARTIN
Attorney General of Texas
PAT BAILEY
Assistant Attorney General
Capitol Station
Austin, Texas 78711
Attorneys for Defendants

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL

ORDER

The Court having held a pretrial conference in this cause on October 2, 1969, it is ORDERED as follows:

(1) This cause is now one properly to be heard by a three-judge court.

(2) The motion to dismiss this cause is overruled.

(3) The motions to dismiss filed by Alamo Heights Independent School District, Harlandale Independent School District, North East Independent School District, Northside Independent School District, San Antonio Independent School District and South San Antonio Independent School District, are hereby granted, provided, however, in the event the plaintiffs at some subsequent time pursue the alternative relief requested in paragraph D of the prayer of their third amended complaint, said school districts, and each of them, upon proper application, will be allowed to intervene in this lawsuit.

(4) Discovery shall be completed by the plaintiffs within six (6) months from this date, and by the defendants within six (6) months thereafter.

(5) A conference of attorneys shall be held on or before thirty (30) days after the completion of all discovery, and counsel shall submit their proposed agreed pretrial order within thirty (30)

days following their conference. The proposed order shall supply information required by Local Court Rule 26, and the pretrial order checklist (Form PT-1), which will be furnished by the Clerk upon request.

(6) In the event counsel are unable to agree on a form of proposed agreed pretrial order, then counsel for each side are directed to submit their version of an appropriate pretrial order within ten (10) days after the expiration of the time set in paragraph (5) hereof; such version shall cover, in addition to the matters contemplated in paragraph (5) of this order, the following:

(a) A list of other facts or exhibits which it is felt opposing counsel should stipulate to, but which he refuses to do. *Local Rule 26 (k).*

(b) Any stipulations, rules, witness lists requirements with respect to trial briefs, or other appropriate matters which counsel feels should be included therein. *Local Rule 26 (m).*

(7) The Court will set a date with notice to counsel of a pretrial conference for the purpose of entering a pretrial order to govern the trial of the case. In this connection, the attorneys who will try this case will familiarize themselves with pretrial rules and come to the conference with full authority to accomplish the purpose of Rule 16 by simplifying the issues, expediting the trial, and saving expenses. See Rule 16, FRCP; 3 Moore's Federal Practice, paragraphs 16.01 to 16.21; 1A Barron & Holtzoff Federal Practice and Procedure, Sections 471-473; 23 Federal Rules Decisions, pp. 129-138; 28 Federal Rules Decisions, pp. 37, et sec.

(8) This Court is aware of the fact that the Legislature of Texas on its own initiative has authorized the appointment of a Committee to study the public school system of Texas and to recommend "a specific formula or formulae to establish a fair and equitable basis for the division of the financial

responsibility between the State and the various local school districts of Texas", but this Court is of the opinion that sufficient time has not elapsed to allow the Committee to "explore all facets and all possibilities in relation to this problem area", and make an adequate report upon which the Legislature can enact appropriate legislation. It is felt, however, that the Committee should conduct its study and make its report in ample time for the Legislature to take such action as it might deem appropriate, not later than the adjournment of the 62nd Legislature, which will convene in January of 1971. Accordingly, even though the discovery and pretrial aspects of this case will continue pursuant to the terms of this order, the setting of a trial on the merits will be held in abeyance pending further developments, and in this connection counsel for defendants are directed to keep the Court and opposing counsel advised at least once in each ninety (90) day period following the date of this order, concerning the progress being made by the Committee and the Legislature with respect to this matter.

(9) The Clerk will furnish a copy of this order to counsel of record by certified mail.

Dated the 15th day of October, 1969.

(Signature)
ADRIAN A. SPEARS,
United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each such judge to so act.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

vs.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

PRE-TRIAL ORDER

On the 5th day of October, 1971, Arthur Gochman appeared as counsel for Plaintiffs, Pat Bailey and Raul Rivera appeared as counsel for Defendants.

1. The following jurisdictional questions were raised and disposed of as hereinafter indicated: None.

2. The following disposition was made of pending motions or other similar matters preliminary to trial: All motions have been disposed of.

3. In general, the Plaintiffs claim that their children have been deprived of equal protection of the laws under the Fourteenth Amendment with regard to public school education as a result of the State public school financing system. Plaintiffs allege that the State financing system makes education expenditures a function of the wealth of each district thereby denying Plaintiffs, and the classes they represent, educational opportunities and resources enjoyed by children attending school in other school districts.

4. In general, the Defendants claim:

(a) That the Plaintiffs have failed to state a claim against Defendants upon which relief can be granted.

(b) That the Fourteenth Amendment of the United States Constitution does not require that public school

expenditures by the State of Texas be made only on the basis of pupils' educational needs.

(c) Lack of judicially manageable standards makes this case nonjusticiable.

(d) The statutes of Texas enacted pursuant to its Constitution provide for a foundation school program which guarantees to all scholastics in the State of Texas a minimum amount of funds sufficient to afford a reasonable education.

(e) The Fourteenth Amendment of the United States Constitution permits the creation of political subdivisions with different powers, rights, functions and duties and does not require one political subdivision to assume the debts and obligations of another or to expend its funds for the benefit of another.

(f) The amount of funds expended by a school district per student does not necessarily determine the quality of the education which the student of the school district will receive. That circumstances and conditions other than the amount of funds expended per scholastic are involved in determining whether or not the education provided the scholastic is of a greater or lower quality than that received by a scholastic in another school district.

(g) That the conditions which the Plaintiffs allege exist in the Edgewood Independent School District are not as a result of constitutional or statutory provisions of the State of Texas, but are as a result of actions by the district itself.

(h) The Fourteenth Amendment of the United States Constitution does not require equal allocation or expenditure of its funds by the states.

(i) The Plaintiffs are seeking to have this Court substitute its discretion for that of the Legislature of

the State of Texas as to the type of financing program for public schools in Texas and this involves a political rather than a judicial decision.

5. Facts and issues not in genuine dispute are attached hereto.

6. The contested issues of fact are: Facts are generally not in dispute. There are, however, some opinions and conclusions that are in dispute.

7. The contested issues of law are:

(a) Plaintiffs and Defendants claim the contested issues of law are:

Whether or not under the facts in this case the Defendants have deprived Plaintiffs and the classes they represent of equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

(b) The Defendants additionally claim the following contested issues of law:

[1] That the Plaintiffs have failed to state a claim against Defendants upon which relief can be granted.

[2] The Fourteenth Amendment of the United States Constitution does not require that public school expenditures by the State of Texas be made only on the basis of pupils' educational needs.

[3] Lack of judicially manageable standards makes this case nonjusticiable.

[4] The statutes of Texas enacted pursuant to its Constitution provide for a foundation school program which guarantees to all scholastics in the State of Texas a minimum amount of funds sufficient to afford a reasonable education.

[5] The Fourteenth Amendment of the United States Constitution permits the creation of political

subdivisions with different powers, rights, functions and duties and does not require one political subdivision to assume the debts and obligations of another or to expend its funds for the benefit of another.

[6] The Fourteenth Amendment of the United States Constitution does not require equal allocation or expenditure of its funds by the states.

[7] The Plaintiffs are seeking to have this Court substitute its discretion for that of the Legislature of the State of Texas as to the type of financing program for public schools in Texas and this involves a political rather than a judicial decision.

(c) Plaintiffs contend that Defendants alleged contested issues numbered 1, 2, 3, and 7 were decided by the Court in its Order of October 15, 1969, and are, therefore, no longer contested issues in this cause, and Defendants alleged issues numbered 4, 5, and 6 are arguments rather than legal issues.

8. The exhibits on the attached list were marked and received in evidence.

9. This it not a jury case.

10. Pleadings are in final form.

11. The following additional matters, to aid in the disposition of the action were determined: None.

12. The probable length of trial of this case is one day.

13. The proposed findings of fact and conclusions of law of each party are attached hereto.

14. A list of the names of all witnesses is attached hereto.

15. All discovery in this case has been completed, except that additional discovery shall be allowed for a period of 30 days.

16. Attorneys' conferences, as required by Order Preliminary to Pre-Trial Conference, have been held, the last being on Sept. 30, 1971.

17. Each party has advised the other with respect to all deposition questions and answers to be offered in evidence and objections thereto have been furnished and are ready for presentation to the Court at the Pre-Trial Conference.

18. Memorandum briefs have been furnished to the Court and opposing counsel with respect to all unusual questions of law. After evidence is submitted the parties desire to update briefs. Plaintiffs' brief must be filed in thirty (30) days, and defendants' another ten days thereafter.

19. A list of questions each party desires the Court to ask prospective jurors on voir dire examination is attached hereto: Not applicable.

20. The parties hereto are (are not) willing to enter into an agreement with reference to the disqualification of jurors: Not applicable.

21. Counsel for all parties have familiarized themselves with respect to the Local Court Rules, particularly Rules 4, 14, 26 and 28.

22. Counsel participating in the Pre-Trial procedures have full authority to accomplish the purpose of Rule 16, Federal Rules of Civil Procedure, and Local Rule 26, by simplifying the issues, expediting the trial and saving expenses.

23. Non-resident counsel have designated a resident attorney as required by Local Rule 4: Not applicable.

24. All parties are ready for pre-trial and trial.

25. The possibility of a compromise settlement has been fully discussed and explored.

26. The case was ordered set down on the non-jury calendar for a later time, after additional discovery and briefing are completed. Counsel will be notified.

No definite setting was made, but it is estimated that it will be reached for trial about _____.

Dated this 5th day of October, 1971, at San Antonio, Texas.

(Signature)
ADRIAN A. SPEARS
United States District Judge

APPROVED:

(Signature)
ARTHUR GOCHMAN
Counsel for Plaintiffs

(Signature)
PAT BAILEY
Counsel for Defendants

(Signature)
RAUL RIVERA
Counsel for Defendants

PLAINTIFFS' EXHIBITS

1. Amount raised per student—State funds
2. Amount raised per student—Local taxes
3. Percentages of Anglo-American, Mexican-American and Negro students in school districts named in suit
4. Value of property per student
5. Tax effort
6. Incomes in named districts
7. Values of property per pupil, expenditures per pupil, statewide sampling

8. Tables attached to Testimony of Joel S. Berke, I thru XI.

9. Graphs attached to Testimony of Joel S. Berke, I thru V

10. Expenditures per pupil in relation to Mexican-American enrollment

In addition, Plaintiffs submit to the Court portions of the Governor's Report and data, reports of the United States Commission on Civil Rights, and Texas Education Agency statistics, all of which Plaintiffs submit as information of which the Court may take judicial notice.

LIST OF WITNESSES

Plaintiffs

Dr. Jose Cardenas—effect of lack of funds

Dr. Don Webb—economic disparities between districts

Dr. Charles Feldstone—validating income statistics

Dr. Daniel C. Morgan, Jr.—the state school financing system

Dr. Joel S. Berke—study of Policy Institute of the Syracuse University Research Corporation on Public School Financing in Texas and results of that study

Richard Avena or Joe Bernal—history of discrimination of Mexican-Americans in the Southwest

Interrogatories of Defendants—all of Set 1, Set 2, Nos. I, II, III, IV, XV and XVI (The statistics submitted relate only to the districts named in the suit. The Court may take Judicial notice of statistics relating to other districts.)

26. The case was ordered set down on the non-jury calendar for a later time, after additional discovery and briefing are completed. Counsel will be notified.

No definite setting was made, but it is estimated that it will be reached for trial about ----------.

Dated this 5th day of October, 1971, at San Antonio, Texas.

(Signature)
ADRIAN A. SPEARS
United States District Judge

APPROVED:

(Signature)
ARTHUR GOCHMAN
Counsel for Plaintiffs

(Signature)
PAT BAILEY
Counsel for Defendants

(Signature)
RAUL RIVERA
Counsel for Defendants

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Interrogatories of Defendants—all of Set 1, Set 2, Nos. I, II, III, IV, XV and XVI (The statistics submitted relate only to the districts named in the suit. The Court may take Judicial notice of statistics relating to other districts.)

Defendants

J. W. Edgar—functions of Commissioner of Education and state system

Leon R. Graham—operation of state financing system

FACTS AND ISSUES NOT IN GENUINE DISPUTE

1. Complainants reside within the boundaries of the Edgewood Independent School District, which is situated within the city limits of San Antonio, a municipality located in Bexar County, Texas. Each of the parent Complainants, who are named below, have children Complainants enrolled in the Edgewood Independent School District,

Parent Complainants	*Children Complainants*
Demetrio P. Rodriguez wife, Helen M. Rodriguez	Alexander Rodriguez
Mrs. Alberta Z. Snid a widow	Jose Snid Catalina Snid Angelina Snid Selina Snid
Joe Hernandez wife, Carmen D. Hernandez	Joe Hernandez, Jr. Yolanda Hernandez Irma Hernandez Richard Hernandez
Martin R. Cantu, Sr.	Linda Cantu Brenda Cantu Blanche Cantu
Reynaldo F. Castano	James Castano Robert Castano Steve Castano

2. Complainants are all of Mexican-American descent.

3. Complainants sue on behalf of themselves and as next friends of their children.

Skip to 6.

6. Complainants sue the State Board of Education and Porter M. Bailes, Jr., MD., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Koch, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, and Herbert O. Willborn in their capacity as members of the State Board of Education. The State Board of Education under Article 2654-3, reviews, evaluates, adopts and promotes plans to meet the educational needs of the public schools within the State of Texas. Under Article 2665, the State Board of Education is in charge of allocation of certain school funds of the State. Under Article 2675b-5, the State Board of Education has the duty to consider the needs of the public schools of the State of Texas and prepare and present a report to the Governor to be transmitted to the legislature upon convening. It is further the duty of the State Board of Education, under said Article, to make statistical studies of education in the State of Texas. Under Article 2922-16, it is the duty of the State Board of Education to estimate the total cost of the Minimum Foundation School Program and to approve assessments for the Minimum Foundation School Program.

7. Complainants sue J. W. Edgar, individually, and in the capacity as Commissioner of Education. The Commissioner of Education is the executive officer of the State Board of Education. He is responsible, under Article 2654-5, for promoting efficiency and improvement in the public school system of the State. Under Article 2656, he administers the school laws of the State and under Article 2657, he advises school officers.

Under Article 2658, he notes the educational progress taking place in the public school system and under Article 2663, he is in charge of distribution of school funds from the State. He is also the executive officer in charge of administering, subject to the approval of the State Board of Education, the Minimum Foundation Program under Articles 2922-16 and 2922-20.

8. Complainants sue Crawford Martin, Attorney General of the State of Texas. In his capacity as Attorney General, he has sought to uphold and enforce the laws of the State of Texas, including Title 49 of Vernon's Annotated Civil Statutes of Texas and Article 2806 thereof, and Article 7, §3 of the Constitution of the State of Texas. The Attorney General derives his authority to be chief law enforcement officer of the State and represents the interests of the State in civil litigation by virtue of Article 4, §22 of the Texas Constitution and the common law. Under Article 4399, he is responsible for giving advisory opinions to the Commissioner of Education with regard to laws relating to education and under Article 2670, he is responsible for approving all school bonds in the State.

9. Complainants sue the Bexar County School Trustees, to-wit: Jack Judson, Lloyd Knowlton, C. W. Barley, H. W. Engelhardt, George Schumacher, Benno Kalbunde and Wayne Simpson. Under Article 2676, these Trustees are the general managers of the public schools of the county. In Bexar County, the authority of the School Trustees is limited since all the schools in the county are in independent school districts. If the Court orders, as alternatively prayed, that a school district or school districts be abolished, it would be incumbent upon the County School Trustees, under Article 2922a, to set the boundary lines of any new school districts that might result.

10. San Antonio Independent School District, Edgewood Independent School District, Harlandale Independent School District, Northside Independent School District, Northeast Independent School District, Alamo Heights Independent School District and South San Antonio Independent School District lie wholly or partly within the City of San Antonio and geographically are situated in one continual and contiguous urban complex that comprises the city of San Antonio and its environs (i.e., cities having contiguous boundaries with the city of San Antonio).

11. This urban complex is in Bexar County, Texas.

12. Neither cities or counties geographically determine these defendant school district boundaries.

13. Costs of goods and services do not vary substantially within the area described.

14. Each of the independent school districts named in the Third Amended Complaint, except Edgewood, hereinafter referred to as "named districts", collects and spends more money per student for their education than the Edgewood Independent School District.

15. The duty to provide education pursuant to the Texas Constitution is a function of the state.

16. The independent school districts are political subdivisions set up by the State for the convenience of the State in maintaining public schools.

17. Under the Texas Constitution it is the duty of the State of Texas to provide funds to support the Texas free public school system, within the limits of the Texas Constitution and Texas Statutes.

18. State funds supporting the Texas free school system (the State financing system) come primarily from two sources: ad valorem property taxes assessed

by school districts, Minimum Foundation Funds and the Available School Fund.

19. The State has delegated the power to each independent school district to levy and collect ad valorem property taxes for maintenance and operation of their respective school systems, within Statutory or Constitutional limits.

20. Each independent school district levies and collects taxes on property within its district. The money collected by such districts must be used solely within the district in which it is collected under the requirements of Article 7, §3 of the Texas Constitution.

21. The other basic sources of revenue from the State in support of the public free school system are derived from the Minimum Foundation School Program and the Available School Fund.

22. The Foundation funds are distributed by the State Commissioner of Education, subject to the approval of the State Board of Education, to the various school districts in the State per Statutory provisions and formula.

23. The value of property in the Edgewood District subject to school ad valorem taxes (local district tax base) is less per student than in the named districts.

24. The educational needs of the children in the named districts are no greater than the educational needs of the children in the Edgewood district.

25. Educational costs in the named districts are no greater than the educational costs in the Edgewood district.

26. Each district levies and collects taxes on property within the district.

27. There are three statutory methods under which the boundaries of the Edgewood Independent School District could be changed and its per student property values possibly increased. They are:

(a) Under Article 2806, a majority of those voting in each independent school district may consolidate two independent school districts.

(b) Under Article 2742, upon election, a portion of one district may be detached and added to another district.

(c) Under Article 2922a, if Edgewood District was abolished by election or changed to a different classification of school district, the County Board of School Trustees could annex it to another district.

28. A school district system of administering public school education is constitutional.

29. Claimants are all of Mexican-American descent.

30. More than 95% of students in the Edgewood district are Americans of Mexican descent.

31. The percentage of Mexican-Americans in the Edgewood district is higher than the percentage of Mexican-Americans in the named districts.

32. The 62nd Texas Legislature took no action with respect to the division of financial responsibility between the State and the various school districts of Texas. The 62nd Texas Legislature passed no laws relevant to this case.

33. The public schools in Texas are financed from three basic sources—state funds, local district funds derived from ad valorem taxes on real and personal property and federal funds.

34. Approximately ten percent (10%) of the over-

all expenditures in the public schools in Texas come from federal sources.

35. Federal funds received by the public schools of the State of Texas are not distributed solely on a per capita basis.

36. The public schools of Texas received slightly over $290,000,000 during the last year from the state available school funds.

37. The Available School Fund is dispersed to the school districts of the State of Texas on a per capita basis which is based on the average daily attendance within the district for the prior school year, but this allotment is subtracted out of the allotment coming from the Minimum Foundation Program.

38. The Constitution of the State of Texas requires that the Available School Fund be dispersed on a per capita basis.

39. The Minimum Foundation Funds received by the school districts in the State of Texas come from general revenue funds of the State of Texas.

40. The total estimated cost of the Minimum Foundation Program in Texas during the school year 1970-1971 was $1,095,202,000 of which the State of Texas, out of state funds, allocated or contributed the amount of $906,741,000.

41. The State of Texas out of state funds pays approximately eighty percent (80%) of the costs of the Minimum Foundation Program and the public school districts of the State of Texas pay the remaining twenty percent (20%) of the costs of the operation of the Minimum Foundation Program.

42. The local fund assignment is the amount of money that each school district in Texas is expected to

contribute to the cost of the Minimum Foundation Program in that district.

43. The local fund asignment for all of the school districts in Texas for the school year 1970-1971 amounted to $188,000,000.

44. For the school year 1970-1971 a school district's local fund assignment constituted what a particular school district's share of the $188,000,000 constituted.

45. Some of the school districts in Texas raise more money than is necessary to fulfill their local fund assignment.

46. The purpose of the economic index of the Minimum Foundation Program is an attempt to measure the tax paying ability of one county of the state as compared with the remaining counties in the state.

47. The economic index of the Minimum Foundation Program also attempts to measure the tax paying ability of one school district within a county as compared with the remaining school districts in the county.

48. The Minimum Foundation Program has been in existence since 1949.

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Complainants reside within the boundaries of the Edgewood Independent School District, which is situated within the city limits of San Antonio, a municipality located in Bexar County, Texas. Each of the parent Complainants, who are named below, have children Complainants enrolled in the Edgewood Independent School District,

Parent Complainants	*Children Complainants*
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Martin R. Cantu, Sr.	Linda Cantu Brenda Cantu Blanche Cantu
Reynaldo F. Castano	James Castano Robert Castano Steve Castano

2. Complainants are all of Mexican-American descent.

3. Complainants sue on behalf of themselves and as next friends of their children.

4. Complainants properly represent the class of all other school children and parents of school children living in the Edgewood Independent School District who are American of Mexican descent.

5. Complainants properly represent the class of all school children who live in the Edgewood Independent School District and all persons in the Edgewood Independent School District.

6. Complainants properly represent the class of all other school children in independent school districts, and all other persons in Texas who have school children in independent school districts who are members of minority groups or are poor.

7. Complainants sue the State Board of Education and Porter M. Bailes, Jr., M.D., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Koch, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, and Herbert O. Willborn in their capacity as members of the State Board of Education. The State Board of Education, under Article 2654-3, reviews, evaluates, adopts and promotes plans to meet the educational needs of the public schools within the State of Texas. Under Article 2665, the State Board of Education is in charge of allocation of certain school funds of the State. Under Article 2675b-5, the State Board of Education has the duty to consider the needs of the public schools of the State of Texas and prepare and present a report to the Governor to be transmitted to the legislature upon convening. It is further the duty of the State Board of Education, under said Article, to make statistical studies of education in the State of Texas. Under Article 2922-16, it is the duty of the State Board of Education to estimate the total cost of the Minimum Foundation School Program and to approve assessments for the Minimum Foundation School Program.

8. Complainants sue J. W. Edgar, individually, and in the capacity as Commissioner of Education. The Commissioner of Education is the executive officer of the State Board of Education. He is responsible, under Article 2654-5, for promoting efficiency and improvement in the public school system of the State. Under Article 2656, he administers the school laws of the State and under Article 2657, he advises school officers. Under Article 2658, he notes the educational progress taking place in the public school system and under

Article 2663, he is in charge of distribution of school funds from the State. He is also the executive officer in charge of administering, subject to the approval of the State Board of Education, the Minimum Foundation Program under Article 2922-16 and 2922-20.

9. Complainants sue Crawford Martin, the Attorney General of the State of Texas. In his capacity as Attorney General, he has sought to uphold and enforce the laws of the State of Texas, including Title 49 of Vernon's Annotated Civil Statutes of Texas and Article 2806 thereof, and Article 7, §3 of the Constitution of the State of Texas. The Attorney General derives his authority to be chief law enforcement officer of the State and represents the interests of the State in civil litigation by virtue of Article 4, §22 of the Texas Constitution and the common law. Under Article 4399, he is responsible for giving advisory opinions to the Commissioner of Education with regard to laws relating to education and under Article 2670, he is responsible for approving all school bonds in the State.

10. Complainants sue the Bexar County School Trustees, to-wit: Jack Judson, Lloyd Knowlton, C. W. Barley, H. W. Engelhardt, George Schumacher, Benno Kalbunde and Wayne Simpson. Under Article 2676, these Trustees are the general managers of the public schools of the county. In Bexar County, the authority of the School Trustees is limited since all the schools in the county are in independent school districts. If the Court orders, as alternatively prayed, that a school district or school districts be abolished, it would be incumbent upon the County School Trustees, under Article 2922a, to set the boundary lines of any new school districts that might result.

11. San Antonio Independent School District, Edgewood Independent School District, Harlandale

Independent School District, Northside Independent School District, Northeast Independent School District, Alamo Heights Independent School District and South San Antonio Independent School District lie wholly or partly within the City of San Antonio and geographically are situated in one continual, and contiguous urban complex that comprises the city of San Antonio and its environs (i.e. cities having contiguous boundaries with the city of San Antonio).

12. The named districts have 93% of the public school students in Bexar County and are all located in a single metropolitan area.

13. This urban complex is in Bexar County, Texas.

14. Neither cities nor counties geographically determine these defendant school district boundaries.

15. No natural geographic reasons exist for their present boundaries.

16. Cost of goods and services do not vary substantially within a single metropolitan area, i.e., the urban complex described above.

17. Each of the independent school districts named in the Third Amended Complaint, except Edgewood, hereinafter referred to as "named districts", collects and spends substantially more money per student for their education than the Edgewood Independent School District.

18. Consequently, the named districts are able to provide a higher quality of education for their students than is Edgewood.

19. The duty to provide education pursuant to the Texas Constitution is a non-delegable function of the state.

20. The independent school districts are political subdivisions set up by the State for the convenience of the State in maintaining public schools.

21. Under the Texas Constitution it is the duty of the State of Texas to provide funds to support the Texas free public school system, within the limits of the Texas Constitution and Texas statutes.

22. State funds supporting the Texas free school system (the State financing system) come primarily from two sources: ad valorem property taxes assessed by school districts, Minimum Foundation Funds and the Available School Fund.

23. The State has delegated the power to each independent school district to levy and collect ad valorem property taxes for maintenance and operation of their respective school systems within statutory or Constituional limits.

24. Each independent school district levies and collects taxes on property within its district. The money collected by such districts must be used solely within the district in which it is collected under the requirements of Article 7, Sec. 3 of the Texas Constitution.

25. The other basic source of revenue from the State in support of the public free school system is derived from the Minimum Foundation School Program and the Available School Fund.

26. The Foundation funds are distributed by the State Commissioner of Education, subject to the approval of the State Board of Education, to the various school districts in the State per statutory provisions and formula.

27. Each district levels and collects taxes on property within the district.

28. The state system of financing public schools does not assure a minimum level of education for all children.

29. The Minimum Foundation Program does not equalize the capacity of school districts to support education.

30. The value of property in the Edgewood District subject to school ad valorem taxes (local district tax base) is substantially less per student than in the named districts.

31. Such tax base is insufficient to bear the burden of equalizing the Edgewood district to the named districts.

32. The vast differences in the tax bases between districts result in substantially less funds available for education in Edgewood and other poor districts.

33. Edgewood and other poor districts tax themselves at higher equalized tax rates yet realize far lower tax revenues than is true in the richer districts.

34. Edgewood and other poor districts make a greater tax effort than do districts with greater tax bases.

35. The only available means Edgewood has to raise its income and expenditures to the other districts is to increase its local ad valorem taxes to raise funds per student comparable to those raised by the other districts, and its tax base is insufficient to bear this burden.

36. The low property values and low family incomes preclude the Edgewood District and other poor districts from collecting funds thru taxation of property within the district equal per student to the other districts.

37. The average incomes and ability to pay taxes of the residents in the Edgewood District are substantially less than the average incomes and ability to pay taxes of the residents in the named districts.

38. The educational needs of the children in the named districts are no greater than the educational needs of the children in the Edgewood district.

39. Educational costs in the named districts are no greater than the educational costs in the Edgewood district.

40. As a result of the amounts expended, the children in the Edgewood District are provided an inadequate and substantially inferior education compared to the children in the named districts.

41. With greater income per student, the named districts are able to hire better qualified teachers, more and better counselors, provide better building facilities, scientific equipment, libraries, equipments and supplies, and maintain a broader and better curriculum than Edgewood.

42. The State does not provide equal educational opportunity to every school child in an independent school district in the State of Texas.

43. The State does not provide an adequate education to every school child in an independent school district in the State of Texas.

44. There are three statutory methods under which the boundaries of the Edgewood Independent School District could be changed and its per student property values possibly increased. They are:

(a) Under Article 2806, a majority of those voting in each independent school district may consolidate two independent school districts.

(b) Under Article 2742, upon election, a portion of one district may be detached and added to another district.

(c) Under Article 2922a, if Edgewood District was abolished by election or changed to a different classification of school district, the County Board of School Trustees could annex it to another district.

45. No administrative procedure exists for Complainants to equalize the system.

46. The Complainants have no remedy or right of redress except thru court action.

47. A school district system of administering public school education is constitutional.

48. The state financing system denies complainants children and other children within the Edgewood district educational opportunities and resources substantially equal to those enjoyed by children attending other named school districts in that the state financing system invidiously discriminates against complainants and other poor because it makes the quality of a child's education a function of the value of property within a district and of the wealth of his parents and neighbors.

49. The students in the Edgewood district are of substantially equal age, aptitude, motivation and ability to the students in the named districts.

50. There is a marked difference in the quality of educational services, equipment and other facilities between Edgewood and the named districts.

51. The use of a "school district" as a unit for the varying allocations of educational funds has no reasonable relation to the Texas Constitutional purpose of providing for general diffusion of knowledge by an efficient system of free public schools.

52. The present financing of such school districts promotes no compelling state interest.

53. The part of the state financing system which requires independent school districts to retain and expend, within their respective boundaries, all of the school taxes collected for the educational purposes of such respective district accomplishes no educational objective.

54. Claimants are all of Mexican-American descent.

55. More than 95% of students in the Edgewood district are Americans of Mexican descent.

56. The percentage of Mexican-Americans in the Edgewood district is higher than the percentage of Mexican-Americans in the named districts.

57. The more Negroes and Mexican-Americans in the school population of a school district in Texas, the lower its revenues for education.

58. There has been a pattern of discrimination against Mexican-Americans in the Southwestern United States (those states having a common border with Mexico, including the State of Texas).

59. Such discrimination has resulted in a generally poorer education, more substandard housing, more limited job opportunities, smaller incomes and more deprivation of civil and political rights for Mexican-Americans than for other white Americans in Texas.

60. Mexican-American residents in the Edgewood district have lower incomes, more substandard housing, poorer education and more limited job opportunities than do residents of the named districts.

61. Because of the state financing system, the operation of Article 7, Sec. 3 of the Texas Constitution and Title 49 of V.A.T.S., further racial discrimination against Mexican-Americans has resulted, thereby lim-

iting complainants and their class to fewer job opportunities, lower incomes, and substandard housing in the future.

62. The State of Texas, in providing a public school system of its citizens, must make available and create a system of equal opportunity of education for all its citizens.

63. The duty to provide such an education is a State obligation and school districts are merely subdivisions of the state government organized for convenience in exercising the governmental function of establishing and maintaining public free schools for the benefits of the people.

64. The state financing system of numerous independent school districts in the same geographic metropolitan area, providing for separate and independent taxing units, taxing rates, and resultant tax income, allows for the condition that exists in which there are vast differences in educational facilities and money spent for each student's education.

65. Such differences deprive Complainants of equal educational opportunity in violation of Amendment Fourteen of the United States Constitution.

66. The injury to Complainant children and to the members of their class as a result of the method of the state financing system is irreparable, and the Complainants and the members of their class will continue to be irreperably injured unless the relief requested by the Complaint is promptly granted.

67. The 62nd Texas Legislature took no action with respect to the division of financial responsibility between the State and the various school districts of Texas. The 62nd Texas Legislature passed no laws relevant to this case.

Conclusions of Law

The Texas public school financing system denies Plaintiffs and the classes they represent equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGES OF SAID COURT:

Come Now the Defendants in the above styled and numbered cause and in connection with the Pre-Trial Order submit this their Proposed Finding of Fact and Conclusions of Law,

FINDING OF FACT

1. The public schools in Texas are financed from three basic sources—state funds, local district funds derived from ad valorem taxes on real and personal property, and federal funds.

2. Approximately ten percent (10%) of the overall expenditures in the public schools in Texas come from federal sources.

3. Federal funds received by the public schools of the State of Texas are not distributed on a per capita basis, but are allocated primarily to help low-income and disadvantaged children.

4. The 1970 census figures will likely result in the Edgewood Independent School District receiving a

greater portion of the federal funds available to public schools.

5. The public schools of Texas receive slightly over $290,000,000 during the last year from the available school funds.

6. The available school fund is dispersed to the school districts of the State of Texas on a per capita basis which is based on the average daily attendance within the district for the prior school year.

7. The Constitution of the State of Texas requires that the available school fund be dispersed on a per capita basis.

8. The Minimum Foundation Funds received by the school districts in the State of Texas come from general revenue funds of the State of Texas.

9. The total estimated cost of the Minimum Foundation Program in Texas during the school year 1970-1971 was $1,095,202,000 of which the State of Texas, out of state funds, allocated or contributed the amount of $906,741,000.

10. The State of Texas out of state funds pays approximately eighty percent (80%) of the costs of the Minimum Foundation Program and the public school districts of the State of Texas pay the remaining twenty percent (20%) of the costs of the operation of the Minimum Foundation Program.

11. The State of Texas, through state funds, pays a larger percentage of the cost of operating the public school system than most states.

12. One of the purposes of the Minimum Foundation Program in Texas was an attempt to furnish a procedure whereby the poorer school districts did not have to pay as large a portion of the cost of operating

the Minimum Foundation Program as the richer school districts.

13. Less affluent school districts do not have to pay as much of the twenty percent (20%) required to be raised on the local level as do more affluent school districts.

14. The local fund assignment is the amount of money that each school district in Texas is expected to contribute to the cost of the Minimum Foundation Program in that district.

15. The local school district is not required to raise its portion of the local fund assignment, and will receive Minimum Foundation Program funds regardless of whether the local fund assignment is raised by the school district.

16. The local fund assignment for all of the school districts in Texas for the school year 1970-1971 amounted to $188,000,000.

17. For the school year 1970-1971 a school districts local fund assignment constituted what a particular school districts share of the $188,000,000 constituted.

18. There is no school district in Texas which has not been able to raise its local fund assignment.

19. Most of the school districts in Texas raise a great deal more money from tax purposes than is necessary to fulfill their local fund assignment.

20. The voters within a school district make the ultimate decision as to whether a school district will raise money in excess of that necessary to operate a Minimum Foundation Program subject to the maximum tax rates permitted by law.

21. The purpose of the economic index of the Minimum Foundation Program is an attempt to measure

the tax paying ability of one county of the state as compared with the remaining counties in the state.

22. The economic index of the Minimum Foundation Program also attempts to measure the tax paying ability of one school district within a county as compared with the remaining school districts in the county.

23. The use of the economic index of the Minimum Foundation Program to determine the tax paying ability of each county and then the breaking down of the county by the use of assessed valuations within the various school districts is an attempt to try to balance out the difference between the wealth of the districts and their abilities to support the public school program.

24. The Minimum Foundation Program has been in existence since 1949.

25. The financing of the public school system and the operation of the Minimum Foundation Program is a very complex undertaking and many problems are presented.

26. Some school districts are able to get more for their educational dollar than can other school districts.

27. The capabilities of a school districts board of trustees and school administrators, as well as the priorities of the particular school district, play a part in determining whether a particular school district gets more for their educational dollar than another school district.

28. There is no effort by the Minimum Foundation Program to discriminate against Mexican-Americans.

29. There are several programs managed by the Texas Education Agency which are directed primarily at assisting the Mexican-American school child.

30. The quality of education that a school child receives while attending a particular school district cannot be determined solely on the amount of money spent per student.

31. The people and voters in some school districts are willing to put more money into education than the people and voters in other school districts and do so by supporting increases in tax rates and the passage of bond issues.

32. Until recently the Edgewood Independent School District maintained very poor financial records and were not on a par with most of the other school districts in Baylor County, Texas.

33. A school district cannot manage its money wisely when it does not know how much money it owes and how much money it has obligated.

34. The Minimum Foundation Program was not designed to insure that each child in every school district had the same amount of money spent upon his education. The Minimum Foundation Program was merely an effort or attempt to equalize the amount of state funds paid to local school districts in relation to their ability to support a public school program.

35. Some of the poor school districts in this state receive almost one hundred percent (100%) of the cost of its foundation school program from state money, whereas some of the richer school districts pay an excess of the twenty percent (20%) state average for operating their Minimum Foundation Program and therefore receive less than eighty percent (80%) of the cost of their program.

36. The only restriction upon the amount of money a local school district raises for education is the limit placed upon the tax rate which can be levied against

real and personal property within the boundaries of the school district.

37. Any transfer of local school funds between school districts raises large problems in connection with the effect this will have upon the bonded indebtedness of the school district.

CONCLUSIONS OF LAW

1. The present Texas scheme for financing public education reflects a rational policy consistent with the mandate of the Texas Constitution. *McInnis v. Shapiro,* 293 F.Supp. 327 (1969) aff'd Sub Nom *McInnis v. Ogilvie,* 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969).

2. Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. *McInnis v. Shapiro,* supra.; and *McInnis v. Ogilvie,* supra.

3. The statutes and constitutional provisions of the State of Texas which permit these unequal expenditures on a district to district basis are neither arbitrary nor unreasonable. *McInnis v. Shapiro,* supra.; *McInnis v. Ogilvie,* supra.

4. There is no constitutional requirement that public school expenditures be made only on the basis of pupil's educational needs without regard to the financial strength of local school districts, nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student. *McInnis v. Shapiro,* supra.; *McInnis v. Ogilvie,* supra.

5. The lack of judicially manageable standards make this controversy non-justiciable. *McInnis v. Shapiro,* supra.; *McInnis v. Ogilvie,* supra.

6. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution does not limit the powers of the State in allocating and distributing State funds. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 57 S.Ct. 688, 81 L.Ed. 1245 (1936); *Hess v. Mullaney*, 213 F.2d 655 (9th Cir. 1954) cert. den. 348 U.S. 836 (1954); *McInnis v. Shapiro*, supra.

7. The dominant purpose of the Minimum Foundation Program was to guarantee to each child of school age of Texas the availability of a Minimum Foundation School Program for nine full months of school, and to establish eligibility requirements applicable to Texas public school districts in connection therewith, and the legislature decided upon a basis of an economic index based on certain factors reflecting economic activity, rather than on a single basis of assessed valuation for determining the tax paying ability of a school district. *McKinney v. Blankenship*, 282 S.W.2d 691, 154 Tex. 132 (1955).

8. The Minimum Foundation Program is not a tax statute, but is a program for allocating and distributing state school funds. *Alton Independent School District v. Central Education Agency*, 259 S.W.2d 737 (Tex.Civ.App. 1953).

9. The issue of the proper allocation and disbursement of state school funds is a political question and not a judicial question because there are no judicially manageable standards to determine which form of school financing by the State would be most equitable. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed.2d 663 (1962); *Powell v. McCormick*, 395 U.S. 486. 89 S.Ct. (1944), 23 L.Ed.2d 491 (1969); *McInnis v. Shapiro*, supra.; *LeBeauf v. State Board of Education*, 244 F. Sup. 256 (1965).

10. The compelling interests test pursuant to the Fourteenth Amendment to the Constitution of the United States is not applicable in the instant case, and the classifications existing in the Texas public school financing program rest upon grounds reasonably related and relevant to achieving the objectives of the State in the financing and support of a public school program. *McInnis v. Shapiro,* supra.

11. Educational expenses are not the exclusive yardstick of a child's educational needs. *McInnis v. Shapiro,* supra.

PLAINTIFFS' EXHIBITS III, VII, X, XI, AND XII INTRODUCED INTO EVIDENCE AT PRETRIAL HEARING OCTOBER 5, 1971.

PLAINTIFFS' EXHIBIT III

Percent of Anglo-American, Mexican-American, and Negro Students in Each District (1968-1969) named in suit.

Source. Answer to Interrogatory V (d), (e), (f) Set 1

School District	*% Anglo-American*	*% Mexican-American*	*% Negro*
Edgewood	3.88	89.66	6.30
North East	91.99	7.38	.10
Alamo Heights	85.15	14.15	.42
San Antonio Independent School District	26.71	58.52	14.48
Harlandale	38.50	61.36	.10
Northside	82.07	15.79	1.71
So. San Antonio	41.21	56.90	1.37

REAL ESTATE MARKET VALUES AND EDUCATION EXPENDITURES (PER PUPIL) IN TEXAS SCHOOL DISTRICTS 1967-1968

PLAINTIFFS' EXHIBIT VII

Sources

1. Data from Report of the Governor's Committee on Public School Education, December 1968. The first 117 counties in alphabetical order were chosen, representing approximately 50% of the school districts in Texas.

2. Obtained by dividing Total Market Value by Average Daily Attendance.

3. Data furnished by Texas Education Agency for 1967-68 in response to plaintiffs' interrogatories Set 1, I (k).

PLAINTIFFS' EXHIBIT VII

County Name District Name	Average Daily Attendance[1] 1967-68	Total Market Value (Mill. of $)[1] 1967-68	Market Value Per Student[2] (1967-68)	Expenditures Per Student[3] (1967-68)
Anderson—				
Cayuga ISD	350	40.693	116,266	595.28
Elkhart ISD	597	29.440	49,313	494.04
Frankston ISD	383	48.447	126,493	563.57
Neches ISD	207	32.005	154,614	768.13
Palestine ISD	3,744	85.997	22,969	438.00
Tucker ISD	772	37.436	48,492	512.57
Slocum ISD	163	19.551	119,945	814.51
Andrews—				
Andrews ISD	2,871	1133.338	394,754	848.16
Angelina—				
Hudson ISD	781	13.925	17,830	401.32
Lufkin ISD	6,165	253.683	41,149	402.50
Huntington ISD	681	24.186	35,515	445.43
Dibol ISD	1,048	65.028	62,050	420.32

Zavalla ISD	291	15.413	52,966	529.26
Central ISD	691	22.489	32,546	413.25
Redland ISD	315	10.437	33,133	346.54
Aransas—				
Aransas ISD	1,762	193.725	109,946	545.00
Archer—				
Archer City ISD	550	68.568	124,669	567.43
Holliday ISD	400	76.589	191,473	711.10
Megargel ISD	135	21.554	159,659	758.96
Windthorst ISD	324	11.272	34,790	440.01
Armstrong—				
Claude ISD	404	61.573	152,408	608.97
Atascosa—				
Charlotte ISD	554	66.824	120,621	597.55
Jourdanton ISD	683	37.714	55,218	489.16
Lytle ISD	513	9.190	17,914	456.24
Pleasanton ISD	1,847	85.563	46,325	494.15
Poteet ISD	1,145	23.651	20,656	443.01
Austin—				
Bellville ISD	1,289	130.874	101,531	511.02
Sealy ISD	901	89.350	99,168	497.33
Wallis ISD	270	25.054	92,793	690.01
Bailey—				
Muleshoe ISD	1,825	125.422	68,724	513.07
Bula ISD	117	10.265	87,735	914.25
Three Way ISD	212	42.733	201,571	719.66
Bandera—				
Medina RHSD	224	29.000	129,464	586.38
Bandera ISD	543	53.614	98,737	492.49
Bastrop—				
Jeddo CSD	21	2.521	120,048	324.57
McDade CSD	77	9.272	120,416	327.10
Bastrop ISD	1,366	58.027	42,480	500.49
Elgin ISD	1,301	38.855	29,865	440.84
Paige ISD	33	7.010	212,424	484.30
Smithville ISD	854	54.896	64,281	614.93

Baylor—				
Seymour RHSD	1,079	132.757	123,037	500.75
Bee—				
Beeville ISD	3,998	128.739	32,201	500.04
Pawnee ISD	250	36.209	144,836	720.23
Pettus ISD	627	89.654	142,989	625.43
Skidmore Tynan ISD	447	70.458	157,624	
Bell—				
Moffat CSD	44	4.145	94,205	380.20
Nolanville CSD	103	4.773	46,340	423.99
Belton ISD	2,658	65.183	24,523	441.75
Salado ISD	216	16.671	77,181	604.60
Temple ISD	7,014	193.515	27,590	435.59
Troy ISD	399	20.050	50,251	515.49
Seaton CSD	28	8.800	314,286	452.21
Rogers ISD	510	20.205	39,618	537.24
Academy ISD	379	15.623	41,222	436.36
Bartlett ISD	460	22.442	48,787	497.78
Holland ISD	260	15.653	60,204	557.04
Killeen ISD	10,280	138.514	13,474	428.22
Bexar—				
East Central ISD	2,461	78.221	31,784	399.63
Judson ISD	1,637	64.428	39,357	397.58
Southwest ISD	2,248	50.160	22,313	386.26
Somerset ISD	662	17.320	26,163	376.12
Southside ISD	1,794	29.985	16,714	406.78
Alamo Hts. ISD	4,846	244.960	50,549	576.62
Harlandale ISD	15,052	176.199	11,706	378.50
Edgewood ISD	19,895	124.127	6,239	334.05
San Antonio ISD	70,162	1575.014	22,448	428.88
So. San Antonio ISD	6,575	76.088	11,572	403.49
North East ISD	22,988	714.915	31,099	439.83
Northside ISD	14,104	320.552	22,728	409.75

Blanco—				
Johnson City ISD	377	65.807	174,554	512.28
Blanco ISD	400	62.744	156,860	527.77
Borden—				
Borden ISD	215	126.312	587,498	1186.85
Bosque—				
Mosheim CSD	17	3.393	199,588	992.12
Iredell RHSD	92	9.368	101,826	851.75
Kopperl RHSD	121	13.597	112,372	721.91
Clifton ISD	682	39.040	57,243	426.72
Meridian ISD	291	17.396	59,780	442.98
Morgan ISD	97	6.368	65,649	651.52
Valley Mills ISD	362	17.159	47,401	466.00
Walnut Springs ISD	98	9.712	99,102	842.43
Cranfills Gap ISD	114	15.610	136,930	749.68
Bowie—				
Spring Hill CSD	126	6.509	51,659	423.04
Hubbard CSD	83	2.187	26,349	398.34
Dekalb ISD	1,252	24.843	19,843	531.27
Maud ISD	442	5.290	11,968	426.23
New Boston ISD	1,342	27.449	20,454	438.64
Simms CSD	399	12.174	30,511	456.27
Malta CSD	74	2.143	28,959	494.26
Hooks ISD	1,180	13.833	11,723	444.60
Leary CSD	129	2.647	20,519	392.82
Liberty-Eylau RHSD	2,395	42.314	17,668	364.96
Redwater ISD	355	8.507	23,963	382.04
Texarkana ISD	6,573	183.457	27,911	446.95
Red Lick CSD	95	2.848	29,979	440.14
Pleasant Gr. CSD	420	16.096	38,324	317.82
Brazoria—				
Pearland ISD	2,403	92.005	38,288	475.72
Manvel ISD	321	83.658	260,617	504.75
Angleton ISD	3,750	271.665	72,444	468.11

Danbury ISD	381	47.744	125,312	516.98
Damon ISD	125	31.821	254,568	577.04
Sweeny ISD	1,729	378.260	218,774	692.84
Columbia-Brazoria	2,531	233.802	92,375	526.55
Alvin ISD	4,180	569.567	136,260	518.50
Brazosport ISD	9,621	793.387	82,464	597.11
Brazos—				
A & M Cons. ISD	2,143	51.485	24,025	548.15
Bryan ISD	7,985	231.409	28,980	453.53
Brewster—				
San Vicente CSD	21	5.234	249,238	806.67
Terlingua CSD	10	2.806	280,600	742.70
Alpine ISD	1,228	58.464	47,609	482.03
Marathon ISD	237	46.943	198,072	771.28
Briscoe—				
San Jacinto CSD	10	8.455	845,500	1076.00
Quitaque ISD	203	13.411	66,064	658.42
Silverton ISD	530	38.902	73,400	517.25
Brooks—				
Brooks ISD	2,243	312.390	139,273	594.69
Brown—				
Early CSD	495	12.979	26,220	392.34
Blanket RHSD	170	7.790	45,824	519.36
May RHSD	154	19.010	123,442	654.96
Zephyr CSD	84	4.977	59,250	864.48
Bangs ISD	408	22.287	54,625	457.69
Brownwood ISD	3,285	104.558	31,829	483.36
Brookesmith ISD	79	11.556	146,278	
Burleson—				
Deanville CSD	92	7.895	85,815	432.89
Cooks Pt. CSD	83	7.671	92,422	483.60
Caldwell ISD	1,072	52.425	48,904	453.60
Somerville ISD	442	28.507	64,495	517.40
Snook ISD	469	37.808	80,614	640.16
Friendship ISD	61	3.668	60,131	882.07

Clay—				
Byers ISD	186	8.662	46,570	524.08
Henrietta ISD	775	50.348	64,965	519.82
Petrolia ISD	450	20.453	45,451	409.86
Bellevue ISD	124	18.019	145,315	732.91
Midway ISD	157	42.993	273,841	792.41
Cochran—				
Morton ISD	987	78.796	79,834	575.34
Whiteface ISD	356	100.463	282,199	989.77
Bledsoe ISD	124	36.503	294,379	1051.94
Coke—				
Bronte ISD	317	54.021	170,413	634.74
Robert Lee ISD	469	93.858	200,124	584.96
Coleman—				
Mozelle RHSD	121	22.206	183,521	650.01
Talpa-Centennial CSD	127	28.784	226,646	739.94
Novice CSD	92	19.273	209,489	928.08
Coleman ISD	1,210	48.648	40,205	541.45
Santa Anna ISD	316	46.835	148,212	609.56
Collin—				
Celina ISD	373	25.239	67,665	545.20
Lovejoy CSD	69	3.617	52,420	435.77
Weston CSD	21	2.696	128,381	439.57
Melissa RHSD	137	8.445	61,642	373.78
Anna ISD	243	11.173	45,979	451.91
McKinney ISD	3,439	94.960	27,613	464.15
Prosper ISD	251	31.202	124,311	487.50
Westminster ISD	102	2.382	23,353	687.98
Wylie ISD	841	21.626	25,715	432.68
Blue Ridge RHSD	193	12.226	63,347	535.47
Community RHSD	399	15.430	38,672	394.82
Farmersville ISD	597	17.148	28,724	445.32
Princeton ISD	610	18.551	30,411	447.17
Plano ISD	3,415	191.657	56,122	458.90
Frisco ISD	661	36.113	54,634	463.38

Allen ISD	458	14.850	32,424	414.77
Collingsworth—				
Quail RHSD	101	26.007	257,495	1094.57
Samnorwood RHSD	168	41.312	245,905	831.15
Dodson ISD	89	6.897	77,494	766.33
Wellington ISD	735	46.748	63,603	515.59
Colorado—				
Bernardo ISD	59	18.315	310,424	436.39
Columbus ISD	1,386	132.711	95,751	434.54
Rice Cons. ISD	1,739	273.128	157,060	
Weimar ISD	768	53.293	69,392	472.19
Comal—				
New Braunfels ISD	3,549	86.390	24,342	474.43
Comal ISD	1,536	94.044	61,227	
Comanche—				
Comanche ISD	1,049	54.079	51,553	416.34
De Leon ISD	597	44.945	75,285	464.93
Gustine ISD	184	14.360	78,043	562.16
Sidney ISD	144	10.075	69,965	575.29
Concho—				
Eola RHSD	131	12.993	99,183	597.32
Paint Rock RHSD	125	27.514	220,112	892.83
Eden ISD	296	33.817	114,247	557.57
Cooke—				
Walnut Bend CSD	28	17.244	615,857	995.14
Rad Ware CSD	83	12.202	147,012	526.48
Sivells Bend CSD	27	12.203	451,963	753.07
Gainesville ISD	2,932	105.320	35,921	408.33
Muenster ISD	412	42.734	103,723	467.71
Valley View ISD	249	16.015	64,317	469.20
Callisburg ISD	263	37.473	142,483	556.52
Era ISD	221	20.572	93,086	468.81
Lindsay ISD	311	114.064	366,765	350.04

Coryell—				
Mound CSD	36	4.190	116,389	571.06
Turnersville RHSD	39	8.994	230,615	859.62
Jonesboro RHSD	160	14.367	89,794	534.14
Evant ISD	219	23.917	109,210	590.62
Gatesville ISD	1,695	58.734	34,651	444.54
Oglesby ISD	143	9.906	69,273	598.46
Copperas Cove ISD	2,527	39.085	15,467	405.84
Cottle—				
Paducah ISD	682	82.607	121,125	494.71
Crane—				
Crane ISD	1,076	555.416	516,186	866.32
Crockett—				
Crockett CSD	947	248.568	262,479	680.87
Crosby—				
Crosbyton ISD	839	63.211	75,341	582.28
Lorenzo ISD	701	77.052	109,917	629.18
Ralls ISD	972	72.548	74,638	516.37
Culberson—				
Culberson RHSD	832	62.517	75,141	521.44
Dallam—				
Dalhart ISD	1,446	82.494	57,050	471.62
Texline ISD	233	49.133	210,871	771.92
Dallas—				
Coppell ISD	438	77.448	176,822	656.24
Carrollton-F'mers Br. ISD	7,677	256.198	33,372	409.09
Sunnyvale ISD	149	17.851	119,805	487.81
Mesquite ISD	14,367	243.216	16,929	364.47
Wilmer-Hutchins ISD	3,951	73.625	18,635	384.74
Lancaster ISD	2,417	64.978	26,884	388.16
De Soto ISD	1,515	40.911	27,004	394.13
Duncanville ISD	3,569	117.495	32,921	364.61

Cedar Hill ISD	602	38.149	63,370	499.58
Dallas ISD	139,504	7620.411	54,625	481.08
Richardson ISD	22,789	696.252	30,552	396.24
Garland ISD	16,739	415.588	24,828	366.35
Grand Pr. ISD	8,955	302.617	33,793	409.86
Highland Pk. ISD	5,024	514.467	102,402	603.61
Irving ISD	20,036	537.136	26,809	413.33
Dawson—				
Dawson ISD	257	53.507	208,198	719.87
Klondike ISD	230	44.879	195,126	666.76
Lamesa ISD	3,142	145.655	46,357	490.23
Union ISD	103	28.330	275,049	814.50
Sands ISD	344	37.188	108,105	609.74
Deaf Smith—				
Walcott CSD	86	45.964	534,465	831.27
Hereford ISD	4,253	302.086	71,029	522.03
Delta—				
Cooper ISD	701	36.345	51,847	561.24
Fannindel ISD	368	10.640	28,913	669.03
Denton—				
Pilot Point ISD	456	39.527	86,682	509.67
Krum ISD	189	28.851	152,651	583.89
Ponder ISD	111	15.502	139,658	645.88
Aubrey ISD	292	19.906	68,171	416.23
Sanger ISD	467	39.849	85,330	464.87
Northwest ISD	816	78.197	95,830	471.31
Argyle RHSD	172	28.210	164,012	425.45
Denton ISD	6,101	221.280	36,269	470.86
Little Elm CSD	107	14.513	135,636	488.44
Lake Dallas ISD	464	18.091	38,989	524.14
Lewisville ISD	2,622	134.912	51,454	445.65
De Witt—				
Meyersville CSD	92	38.162	414,804	588.32
Westhoff RHSD	107	16.528	154,467	351.87
Cuero ISD	1,970	105.783	53,697	529.68
Nordheim ISD	214	31.255	146,051	798.89

Yoakum ISD	1,451	72.138	49,716	546.14
Yorktown ISD	738	60.452	81,913	666.24
Dickens—				
Girard ISD	75	47.405	632,067	1710.24
McAdoo ISD	129	19.199	148,829	743.06
Spur ISD	568	27.552	48,507	608.99
Patton Sprgs. ISD	153	23.956	156,575	830.46
Dimmit—				
Asherton ISD	292	14.673	50,250	471.89
Carrizo Sprgs. ISD	1,824	66.186	36,286	459.51
Donley—				
Clarendon ISD	622	73.292	117,833	606.51
Hedley ISD	139	10.422	74,978	731.65
Duval—				
Ramirez CSD	90	26.558	295,089	1300.11
Realitos CSD	90	6.072	67,467	677.96
Benavides ISD	1,687	160.887	95,369	828.96
San Diego ISD	1,479	53.635	36,264	643.26
Eastland—				
Carbon ISD	142	13.302	93,676	676.23
Cisco ISD	830	38.593	46,498	442.98
Eastland ISD	703	27.051	38,479	439.67
Gorman ISD	285	19.439	68,207	495.28
Olden ISD	146	10.183	69,747	582.69
Ranger ISD	610	28.864	47,318	423.07
Rising Star ISD	260	20.736	79,754	546.74
Desdemona ISD	98	5.647	57,622	800.27
Ector—				
Ector ISD	23,180	1547.218	66,748	539.10
Edwards—				
Carta Valley CSD	3	17.424	5808000	3043.67
Rocksprings ISD	440	63.341	143,957	508.30
Nueces Cyn. ISD	309	60.424	195,547	704.87
Ellis—				
Midlothian ISD	780	66.285	84,981	470.94
Milford ISD	176	22.089	125,506	761.01

Red Oak ISD	350	20.550	58,714	475.49
Waxahachie ISD	3,135	104.973	33,484	384.05
Maypearl ISD	178	27.919	156,848	697.20
Forreston ISD	150	21.912	146,080	613.50
Italy ISD	389	36.270	93,239	508.26
Ferris ISD	1,007	28.890	28,689	400.55
Palmer ISD	224	15.553	69,433	639.13
Avalon ISD	176	14.843	84,335	700.13
Ennis ISD	2,820	117.341	41,610	452.08
El Paso—				
Tornillo ISD	231	30.073	130,186	524.18
Socorro ISD	1,019	55.536	54,500	430.55
Fabens ISD	1,404	30.658	21,836	449.73
San Elizario ISD	238	8.248	34,655	397.90
Clint ISD	504	30.737	60,986	700.79
Anthony ISD	367	5.551	15,125	504.10
Canutillo ISD	1,033	27.441	26,564	395.37
El Paso ISD	55,296	1204.955	21,791	500.34
Ysleta ISD	27,085	375.786	13,874	393.02
Erath—				
Three Way CSD	26	3.983	153,192	622.23
Huckabay RHSD	129	13.436	104,155	556.50
Lingleville RHSD	99	8.125	82,071	748.48
Bluff Dale CSD	20	3.728	186,400	562.05
Morgan Mill CSD	49	4.128	84,245	456.45
Dublin ISD	566	28.497	50,348	517.00
Stephenville ISD	1,654	56.076	33,903	469.94
Falls—				
Westphalia CSD	92	3.360	36,522	492.34
Chilton ISD	347	13.639	39,305	525.28
Lott ISD	316	17.215	54,478	605.39
Marlin ISD	2,452	52.363	21,355	485.63
Rosebud ISD	682	29.703	43,553	525.50
Fannin—				
Lannius CSD	15	1.654	110,267	566.13
Dodd City RHSD	121	3.975	32,851	637.47

Ector RHSD	112	4.101	36,616	719.22
Gober RHSD	89	5.189	58,303	830.67
Windom RHSD	92	3.832	41,652	739.00
Bonham ISD	1,840	50.439	27,413	455.48
Honey Grove ISD	590	17.498	29,658	495.16
Leonard ISD	368	10.036	27,272	462.58
Savoy ISD	188	32.751	174,207	573.20
Trenton ISD	171	5.740	33,567	592.12
Sam Rayburn ISD	208	10.880	52,308	706.28
Fayette—				
Praha CSD	35	2.029	57,971	418.37
Fayetteville RHSD	260	22.025	84,712	552.20
Cistern RHSD	35	14.841	424,029	503.54
Flatonia ISD	454	32.626	71,863	551.98
La Grange ISD	1,307	92.308	70,626	525.81
Schulenburg ISD	534	45.042	84,348	545.83
Round Top ISD	204	35.181	172,456	696.96
Fisher—				
Hobbs ISD	137	47.926	349,825	1029.80
McCaulley ISD	113	18.631	164,876	976.30
Roby ISD	326	29.093	89,242	664.13
Rotan ISD	806	60.853	75,500	432.40
Floyd—				
South Plains CSD	96	14.937	155,594	360.21
Dougherty CSD	53	13.999	264,132	466.58
Providence CSD	61	6.440	105,574	331.36
Floydada ISD	1,639	93.131	56,822	574.71
Lockney ISD	998	62.727	62,853	510.97
Foard—				
Crowell ISD	474	70.656	149,063	555.05
Fort Bend—				
Lamar ISD	6,217	475.504	76,484	496.55
Orchard ISD	282	44.871	159,117	766.93
Needville ISD	1,167	102.638	87,950	495.11
Kendleton ISD	260	16.215	62,365	566.21
Fort Bend ISD	3,799	264.255	69,559	598.44

Franklin—				
Mt. Vernon ISD	734	129.847	176,903	644.25
Freestone—				
Dew CSD	60	7.796	129,933	375.72
Trahin CSD	22	1.844	83,818	346.36
Donie ISD	30	4.996	166,533	581.53
Fairfield ISD	879	70.707	80,440	545.92
Teague ISD	850	41.523	48,851	536.14
Wortham ISD	291	21.667	74,457	645.14
Butler ISD	264	7.126	26,992	676.29
Frio—				
Dilley ISD	827	88.400	106,892	445.01
Pearsall ISD	1,953	92.016	47,115	464.55
Gaines—				
Seminole CSD	1,918	663.626	345,999	680.45
Seagraves ISD	817	62.021	75,913	644.06
Loop ISD	206	53.139	257,956	898.73
Galveston—				
Clear Creek ISD	7,229	708.288	97,979	557.77
Friendswood ISD	1,165	51.831	44,490	515.00
Galveston ISD	11,526	544.563	47,246	510.58
High Island ISD	231	67.726	293,186	940.52
Hitchcock, ISD	1,683	58.062	34,499	450.57
Santa Fe ISD	1,655	83.883	50,685	471.89
Dickinson ISD	3,393	190.046	56,011	545.80
La Marque ISD	6,420	369.587	57,568	551.76
Texas City ISD	6,775	432.471	63,833	566.43
Garza—				
Justiceburg CSD	17	15.818	930,471	1073.94
Post ISD	1,146	94.857	82,772	544.67
Southland ISD	162	19.405	119,784	601.43
Gillespie—				
Rocky Hill CSD	43	5.871	136,535	306.44
Stonewall CSD	102	13.848	135,765	495.03
Doss CSD	32	13.778	430,563	522.09

Fredericksburg ISD	1,494	139.164	93,149	443.41
Harper ISD	173	48.023	277,590	694.03
Glasscock—				
Glasscock ISD	311	65.113	209,367	599.54
Goliad—				
Goliad ISD	1,060	252.857	238,544	654.30
Gonzales—				
Gonzales ISD	2,276	107.464	47,216	501.13
Nixon ISD	751	27.700	36,884	470.32
Smiley ISD	289	22.088	76,429	514.76
Waelder ISD	387	20.048	51,804	708.63
Gray—				
Grandview CSD	17	20.725	1219118	1556.24
Alanreed ISD	21	17.796	847,429	1800.76
Lefors ISD	236	54.739	231,945	1076.82
McLean ISD	358	29.617	82,729	624.99
Pampa ISD	5,512	297.711	54,011	520.18
Hopkins ISD	13	23.636	1818154	3706.77
Grayson—				
Pottsboro CSD	599	39.970	66,728	416.43
Bells ISD	333	12.974	38,961	448.00
Denison ISD	5,711	158.126	27,688	442.16
Collinsville ISD	216	9.915	45,903	479.03
Howe ISD	434	22.155	51,048	438.62
Sherman ISD	6,341	206.642	32,588	470.55
Van Alstyne ISD	446	18.965	42,522	407.67
Whitesboro ISD	680	64.617	95,025	524.09
Whitewright ISD	469	16.265	34,680	452.36
White Rock CSD	41	.335	8,171	493.56
S and S Cons. RHSD	210	67.494	321,400	848.57
Gunter RHSD	170	12.800	75,294	500.54
Tom Bean RHSD	259	9.610	37,104	454.64
Tioga CSD	76	6.273	82,539	374.16

Gregg—				
Sabine ISD	522	101.264	193,992	855.41
Spring Hill ISD	370	88.179	238,322	790.65
White Oak ISD	628	250.897	399,518	809.94
Gladewater ISD	1,730	198.444	114,708	799.69
Kilgore ISD	3,218	177.514	55,163	565.64
Longview ISD	9,085	280.626	30,889	479.40
Pinetree ISD	2,693	131.358	48,778	470.63
Grimes—				
Anderson ISD	280	19.420	69,357	590.07
Iola ISD	186	24.363	130,984	556.84
Navasota ISD	2,246	106.980	47,631	464.78
Richards ISD	217	20.043	92,364	670.92
Shiro ISD	49	21.642	441,673	660.65
Guadalupe—				
Schert-Cibolo ISD	2,840	49.013	17,258	389.03
Marion ISD	455	8.766	19,266	507.64
Navarro ISD	331	12.237	36,970	515.11
Seguin ISD	4,370	155.050	35,481	461.36
Hale—				
Abernathy ISD	1,040	113.384	109,023	577.33
Cotton Center ISD	306	40.213	131,415	579.31
Hale Center ISD	849	65.322	76,940	558.33
Petersburg ISD	764	65.574	85,830	574.02
Plainview ISD	6,265	355.508	56,745	482.93
Hall—				
Estelline ISD	166	20.135	121,295	820.98
Memphis ISD	795	40.903	51,450	524.88
Turkey ISD	221	21.739	98,367	630.78
Lakeview ISD	132	17.273	130,856	1037.11
Hamilton—				
Carlton ISD	68	7.884	115,941	1129.47
Hamilton ISD	737	42.249	57,326	449.03
Hico ISD	285	18.631	65,372	450.11
Pottsville ISD	105	11.584	110,324	784.82

Hansford—				
Gruver ISD	617	159.710	258,849	748.81
Morse ISD	92	29.809	324,011	1386.55
Spearman ISD	1,080	223.416	206,867	725.83
Hardeman—				
Chillicothe ISD	428	50.469	117,918	570.68
Quanah ISD	1,098	102.870	93,689	497.84
Hardin—				
Votaw CSD	29	4.640	160,000	511.07
Kountze ISD	1,061	67.988	64,079	552.25
West Hardin ISD	468	39.198	83,756	633.52
Hardin-Jefferson ISD	1,692	102.305	60,464	576.38
Lumberton ISD	1,010	28.603	28,320	530.63
Silsbee ISD	3,439	103.517	30,101	433.20
Harris—				
Alief ISD	831	97.983	117,910	609.94
Spring Br. ISD	29,291	832.841	28,433	457.68
Katy ISD	1,184	301.773	254,876	705.30
Tomball ISD	1,178	118.275	100,403	580.73
Klein ISD	1,575	112.746	71,585	574.99
Spring ISD	1,004	82.402	82,074	546.57
Sheldon ISD	2,077	118.321	56,967	522.38
Huffman ISD	365	31.995	87,658	534.47
Humble ISD	1,913	130.499	68,217	470.34
Crosby ISD	1,981	65.360	32,993	412.14
Aldine ISD	16,506	307.295	18,617	401.35
Channelview ISD	2,899	64.284	22,175	414.70
Cypress-Fairbanks ISD	4,821	306.792	63,637	599.10
Deer Park ISD	5,259	760.900	144,685	769.83
Northeast Houston ISD	12,510	177.807	14,213	403.79
Galena Park ISD	10,699	457.905	42,799	538.00
Goose Creek ISD	11,694	870.665	74,454	591.00
Houston ISD	203,264	8668.480	42,646	498.53

La Porte ISD	3,399	205.154	60,357	644.21
Pasadena ISD	30,364	907.471	29,886	464.63
Harrison—				
Karnack ISD	658	31.840	48,389	462.81
Marshall ISD	6,677	174.412	26,121	431.87
Waskom ISD	696	28.667	41,188	454.37
Hallsville ISD	1,384	162.942	117,733	481.10
Harleton ISD	422	13.499	31,988	410.53
Elysian Fields ISD	608	35.070	57,681	596.50
Hartley—				
Hartley RHSD	169	30.557	180,811	779.49
Channing ISD	171	80.146	486,690	953.01
Haskell—				
Paint Creek CSD	116	31.563	272,095	969.69
Carney RHSD	147	18.311	124,565	889.70
Weinert RHSD	104	12.149	116,817	991.17
Haskell ISD	852	36.398	42,721	481.04
Rochester ISD	229	26.623	116,258	653.95
Rule ISD	350	20.458	58,451	561.71
Hays—				
San Marcos ISD	4,019	98.128	24,416	478.08
Dripping Springs ISD	457	59.443	130,072	437.15
Hemphill—				
Glazier CSD	6	4.205	700,833	1438.50
Patton CSD	3	10.245	3415000	4142.00
Blue Ridge CSD	11	7.384	671,273	1175.36
Canadian ISD	652	44.014	67,506	539.55
Henderson—				
St. Paul CSD	169	4.213	24,929	440.09
Bethel CSD	70	6.804	97,200	393.33
La Poynor CSD	329	105.005	319,164	534.85
Murchison CSD	73	5.578	76,411	462.77
Athens ISD	2,532	89.772	35,455	453.87
Brownsboro ISD	842	51.751	61,462	505.05
Cross Roads ISD	186	25.716	138,258	431.81

Eustace ISD	189	12.829	67,878	597.80
Malakoff ISD	691	34.419	49,810	468.73
Trinidad ISD	188	29.603	157,463	821.09
Hidalgo—				
La Villa ISD	393	11.257	28,644	615.55
Monte Alto ISD	302	18.018	59,662	365.10
Edcouch Elsa ISD	2,466	21.821	8,849	433.18
Mercedes ISD	3,257	31.264	9,599	475.31
Relampago CSD	82	2.172	26,488	452.34
Weslaco ISD	5,095	57.102	11,207	440.45
Palm Gard. CSD	143	5.399	37,755	211.45
Progresso ISD	259	11.724	45,266	363.69
Donna ISD	3,186	34.471	10,820	441.29
Runn CSD	131	5.696	43,481	330.30
McAllen ISD	10,218	177.968	17,417	494.47
Valley View CSD	129	6.207	48,116	246.40
Hidalgo ISD	549	25.894	47,166	453.48
Sharyland ISD	946	14.727	15,568	424.07
La Joya ISD	1,519	54.804	36,079	596.23
Alton ISD	358	5.855	16,355	422.32
Mission ISD	3,960	38.341	9,682	437.30
Edinburg ISD	6,854	215.517	31,444	528.95
Pharr—San Juan—				
Alamo ISD	7,611	111.255	14,618	491.38
Hill—				
Penelope RHSD	145	7.330	50,552	628.98
Abbott ISD	288	12.986	45,090	475.53
Bynum ISD	200	14.509	72,545	658.78
Covington ISD	133	4.719	35,481	510.44
Hillsboro ISD	1,552	54.133	34,880	474.05
Hubbard ISD	368	13.414	36,451	520.44
Itasca ISD	610	28.124	46,105	537.31
Malone ISD	88	10.167	115,534	483.65
Mount Calm ISD	74	10.501	141,905	558.23
Whitney ISD	408	18.182	44,564	500.20
Aquilla ISD	147	11.251	76,537	417.10

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Blum ISO	166	17.583	105,922	595.66
Hockley—				
Pep CSD	93	10.511	113,022	871.96
Anton ISD	431	37.387	86,745	627.43
Levelland ISD	3,085	243.064	78,789	575.32
Ropes ISD	463	65.129	140,667	620.35
Smyer ISD	270	49.106	181,874	680.19
Sundown ISD	361	217.766	603,230	951.09
Whitharral ISD	233	36.050	154,721	793.35
Hood—				
Granbury ISD	855	33.039	38,642	451.84
Lipan ISD	153	18.750	122,549	729.27
Tolar ISD	150	12.490	83,267	620.93
Hopkins—				
Cumby RHSD	185	5.721	30,924	518.65
N. Hopkins RHSD	164	7.356	44,854	657.16
Miller Gr. RHSD	139	4.117	29,619	543.35
Saltillo RHSD	146	5.236	35,863	568.82
Sulphur Springs ISD	2,797	84.764	30,305	432.16
Como-Pickton ISD	323	30.724	95,121	597.33
Sulphur Bluff ISD	146	12.630	86,507	620.42
Houston—				
Austonio CSD	92	14.180	154,130	496.04
Kennard CSD	362	28.279	78,119	496.77
Crockett ISD	2,053	42.100	20,507	490.25
Grapeland ISD	631	41.827	66,287	563.96
Lovelady ISD	434	45.244	104,249	649.88
Latexo ISD	107	9.905	92,570	936.01
Howard—				
Big Spring ISD	7,052	232.977	33,037	554.16
Coahoma ISD	942	76.528	81,240	524.69
Forsan ISD	388	69.841	180,003	773.21
Hudspeth—				
Allamoore CSD	7	12.032	1718857	773.43
Ft. Hancock ISD	249	21.894	87,928	794.65

Sierra Blanca ISD	160	17.052	106,575	748.04
Dell City ISD	337	24.395	72,389	546.55
Hunt—				
Boles Home CSD	196	1.185	6,046	607.93
Caddo Mills ISD	344	12.204	35,477	461.67
Celeste ISD	269	9.091	33,796	526.82
Commerce ISD	1,241	36.293	29,245	486.47
Greenville ISD	5,156	150.830	29,253	420.44
Lone Oak ISD	301	15.602	51,834	477.80
Quinlan ISD	458	37.290	81,419	450.22
Wolfe City ISD	435	18.758	43,122	486.36
Campbell ISD	164	23.626	144,061	493.70
Bland ISD	180	8.133	45,183	632.76
Hutchinson—				
Plemons CSD	57	31.837	558,544	1612.65
Borger ISD	4,044	182.657	45,167	547.11
Phillips ISD	738	99.582	134,935	881.98
Sanford ISD	657	46.825	71,271	629.63
Stinnett ISD	708	45.753	64,623	613.06
Spring Creek ISD	51	38.800	760,784	1810.29
Pringle ISD	44	43.760	994,545	2055.20

EXPENDITURES PER PUPIL IN ADA IN TEXAS

Districts 10 percent or more Mexican American with total enrollment 300 pupils or more*

(Expenditures are from State and local revenue only)

Percent Mexican American of District Enrollment	Districts in Sample		Estimates for All Districts	
	Number of Districts	Per Pupil Expenditures	Number of Districts	Per Pupil Expenditures
10-19.9	55	$457	85	$444
20-29.9	38	484	59	477
30-49.9	32	444	49	444
50-79.9	39	377	60	382
80-100	23	292	30	297

*Source: U. S. Commission on Civil Rights study encompassing a random sample of districts in Texas.

PLAINTIFFS' EXHIBIT X

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

vs.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

ANSWERS TO INTERROGATORIES

I. Series of interrogatories relating to school funds provided each school district:

(a) Sources of each district's income.

ANSWER:

1. Local ad valorem tax based on real and personal property.

2. State funds to support Foundation School Program which funds consist of the per capita payment made from the Available School Fund, and additional payments for most districts made directly from the Foundation Program School Fund.

3. Payments from the County Available Fund (quite small and not applicable to all counties).

4. Payments from the countywide equalization tax

5. Funds from Federally assisted programs

6. Tuition from non-resident pupils and gifts from private sources

(b) Total market value of taxable property in each district at 100% valuation.

ANSWER: Not available; Texas Education Agency

does not require school districts to report total market value of taxable property.

(c) Percentage of market value at which each district's property is assessed. Give both claimed percentage and State's estimate of actual percentage.

ANSWER: Not available (Texas Education Agency does not require district to report percentage of market value at which property is assessed.)

(d) The tax rate of each district.

ANSWER: The maintenance tax rate and the debt service (bond) tax rates for each Texas school district for 1965-66, 1966-67, and 1967-68 are shown in Columns D-M, D-B of exhibits 1-a, 1-b, and 1-c. By school districts they are as follows:

1965-66 (Exhibit 1-a)

School District	Maintenance Bond (D-M)	Bond Rate (D-B)
Edgewood	.60	.59
North East	1.00	.45
Alamo Heights	.99	.21
SAISD	.97	.33
Harlandale	.83	.45
Northside	.55	.50
South San	1.05	.50

PLAINTIFFS' EXHIBIT XI

1966-67 (Exhibit 1-b)

School District	Maintenance Bond (D-M)	Bond Rate (D-B)
Edgewood	.60	.59
North East	1.00	.45
Alamo Heights	1.00	.20
SAISD	1.09	.34
Harlandale	.93	.50

Northside	.50	.70
South San	1.05	.50

1967-68 (Exhibit 1-c)

School District	Maintenance Bond (D-M)	Bond Rate (D-B)
Edgewood	.52	.67
North East	1.00	.45
Alamo Heights	1.20	.20
SAISD	1.09	.37
Harlandale	.93	.50
Northside	.65	.55
South San	.85	.55

(e) Amount of tax income each district receives from its ad valorem taxes.

ANSWER: The amount of tax income separate for maintenance and debt service is shown for 1965-66, 1966-67 and 1967-68 in Columns E-M and E-B of Exhibits 1-a, 1-b, and 1-c. They are as follows:

1965-66 (Exhibit 1-a)

School District	Maintenance Dollars (E-M)	Bond Dollars (E-B)
Edgewood	248,480	244,338
North East	2,185,840	1,107,290
Alamo Heights	1,112,456	236,182
SAISD	6,409,759	2,177,741
Harlandale	583,294	327,134
Northside	481,574	436,004
South San	285,719	136,069

1966-67 (Exhibit 1-b)

School District	Maintenance Dollars (E-M)	Bond Dollars (E-B)
Edgewood	258,596	254,286
North East	2,504,306	1,114,812
Alamo Heights	1,180,372	231,387
SAISD	7,544,990	2,544,541

Harlandale	737,891	397,646
Northside	904,289	770,189
South San	412,314	266,410

1967-68 (Exhibit 1-c)

School District	Maintenance Dollars (E-M)	Bond Dollars (E-B)
Edgewood	223,034	279,023
North East	2,818,148	1,249,159
Alamo Heights	1,433,473	236,074
SAISD	7,544,990	2,544,541
Harlandale	737,891	397,646
Northside	904,269	770,189
South San	412,314	266,410

(f) Amount of funds received by each district under the Minimum Foundation Program:

ANSWER: The amount of funds received under the Foundation School Program for the 1965-66, 1966-67 and 1967-68 school years for each district are furnished in Columns F-PC and MFP of Exhibits 1-a, 1-b, and 1-c. Column F-PC shows per capita payments while Column MFP gives payments made direct from the Foundation Fund. They are as follows:

1965-66 (Exhibit 1-a)

School District	Per Capita Dollars (F-PC)	Other Dollars in Minimum Foundation (MFP)
Edgewood	1,936,052	2,400,135
North East	1,864,064	2,533,616
Alamo Heights	513,205	550,108
SAISD	7,624,794	7,359,030
Harlandale	1,454,304	2,103,315
Northside	955,591	1,348,162
South San	564,553	860,222

1966-67 (Exhibit 1-b)

School District	Per Capita Dollars (F-PC)	Other Dollars in Minimum Foundation (MFP)
Edgewood	1,925,047	2,511,184
North East	2,098,785	2,766,250
Alamo Heights	523,061	561,055
SAISD	7,714,440	7,551,607
Harlandale	1,529,661	2,057,548
Northside	1,117,971	1,892,843
South San	609,959	826,094

1967-68 (Exhibit 1-c)

School District	Per Capita Dollars (F-PC)	Other Dollars in Minimum Foundation (MFP)
Edgewood	2,036,030	3,022,752
North East	2,384,679	3,436,407
Alamo Heights	567,945	645,037
SAISD	8,163,590	9,161,680
Harlandale	1,695,171	2,477,608
Northside	1,405,357	2,475,222
South San	684,620	1,084,816

(g) Amount of funds received by each district from the State, not derived from either the Minimum Foundation Program or ad valorem taxes collected by the district.

ANSWER: Column G of exhibits 1-b and 1-c furnish the amount of other funds received from the State for the 1966-67 and 1967-68 school years. Data for 1965-66 are not available on the computer tapes. They are as follows:

1966-67 (Exhibit 1-b)

School District	Other State Funds, i.e., supplemental salary and Incentive Aid (G)
Edgewood	29,900
North East	33,032

Alamo Heights	5,075
SAISD	68,888
Harlandale	22,750
Northside	0
South San	0

1967-68 (Exhibit 1-c)

School District	Other State Funds, i.e., supplemental salary and Incentive Aid (G)
Edgewood	20,350
North East	47,232
Alamo Heights	9,060
SAISD	140,400
Harlandale	30,705
Northside	0
South San	0

(h) Amount of funds received by each district from the federal government basis for such funds.

ANSWER: Total Federal funds received by each school district for 1965-66, 1966-67 and 1967-68 are shown in Column H of Exhibits 2-a, 2-b, and 2-c. Time constraints did not permit a break down of the specific Federal programs in each district and the amounts received by each district. Figures are as follows:

Amount of Funds received from Federal Agencies (Exhibits 2-a, b, and c)

School District	1965-66	1966-67	1967-68
Edgewood	2,230,302	2,366,051	2,376,695
North East	1,150,734	1,079,610	1,189,048
Alamo Heights	188,801	223,609	186,154
SAISD	4,869,830	5,890,822	5,550,113
Harlandale	1,219,200	924,108	1,118,398
Northside	1,478,251	1,235,381	1,188,821
South San	559,697	773,648	1,003,880

(i) Amount of funds received by each district from private sources and please state the sources.

ANSWER: We do not have a separate total for funds received by school districts from private sources. Column I of Exhibits 2-a, 2-b, 2-c give total funds received by school districts from private gifts, parental tuition paid and transportation fees, if any. Figures are as follows:

Amount of Funds Received from Private Sources, i.e., gifts, etc.
(Exhibits 2-a, b, and c)

School District	1965-66	1966-67	1967-68
Edgewood	17,286	39,649	80,830
North East	273,761	248,303	526,812
Alamo Heights	53,673	115,451	141,784
SAISD	627,822	560,295	668,062
Harlandale	71,817	99,569	92,893
Northside	50,522	166,639	130,742
South San	29,652	30,456	95,640

(j) Amount of funds received by each district from other sources and please designate the sources.

ANSWER: Column J of Exhibits 2-a, 2-b, and 2c-furnishes the amounts funds received by school districts from "other" sources. Such sources are usually from the county available school fund and/or from a county-wide equalization tax. Column J is as follows:

Amount of Funds Received from other Sources; County Available, County Equalization, etc.

School District	1965-66	1966-67	1967-68
Edgewood	177	199	205
North East	176	203	220
Alamo Heights	50	56	54
SAISD	735	909	819
Harlandale	145	159	160
Northside	83	104	118
South San	55	61	64

(k) Each school district's expenditure per pupil and please provide the formula used to arrive at such expenditure.

ANSWER: Per pupil expenditures by district for 1966-67 are shown in Exhibit 3-a, *Annual Statistical Report, Part II, Texas Education Agency Bulletin No. 680.* For the 1967-68 school year per pupil expenditures are shown in the last column of computer printout marked Exhibit 3-b. Per pupil expenditure is determined by dividing total expenditures for current operation by the gross average daily attendance of the school district.

School District's Expenditures Per Pupil
(Exhibits 3-a and b)

School District	1966-67	1967-68
Edgewood	289.83	334.05
North East	389.96	439.83
Alamo Heights	499.84	576.62
SAISD	392.80	428.88
Harlandale	348.07	378.50
Northside	348.34	409.75
South San	370.40	403.49

(1) The amount of each school district's bonded indebtedness:

ANSWER: The amounts of each school district's bonded indebtedness as reported for 1965-66, 1966-67, and 1967-68 are shown in Column L of Exhibits 2-a, 2-b, and 2-c. Figures are as follows:

Amount of Bonded Indebtedness
(Exhibits 2-a, b and c)

School District	1965-66	1966-67	1967-68
Edgewood	3,133,000	3,632,000	4,419,000
North East	18,581,000	18,102,000	24,301,000
Alamo Heights	2,739,000	2,847,000	6,947,000

SAISD	25,477,000	23,726,000	26,940,000
Harlandale	7,296,000	7,697,000	7,993,000
Northside	7,517,000	9,983,000	11,257,000
South San	2,705,000	4,349,000	4,302,000

(m) Breakdown of each school district's expenditures in the following categories:

1. annual payment of bonded indebtedness
2. operation expenses
3. other expenses, if any, and please describe

ANSWER: The breakdown of each school district's expenditures in the three categories requested.

1. Annual payment of bonded indebtedness for the 1965-66, 1966-67, and 1967-68 school years shown in Column M-1 of Exhibits 4-a, 4-b, and 4-c.

2. Operation expenses for the three years are shown in Column M-2 of Exhibits 4-a, 4-b, and 4-c.

3. Other expenses for the three years are given in Column M-3 of Exhibits 4-a, 4-b, and 4-c. Such expenses are primarily for the construction of new physical facilities and/or for the renovation of existing facilities. Tables are as follows:

1965-66
(Exhibits 4-a, b, and c)

School District	Annual Payments of Bonded Indebtedness	Operation Expenses	Other Expenses
Edgewood	211,191	5,687,297	1,065,084
North East	1,131,207	7,036,593	2,434,944
Alamo Heights	223,848	2,269,546	119,027
SAISD	2,521,034	25,496,329	4,692,987
Harlandale	345,585	5,176,211	939,707
Northside	422,914	3,533,899	1,643,261
South San	124,851	1,968,662	456,888

1966-67

(Exhibits 4-a, b, and c)

School District	Annual Payments of Bonded Indebtedness	Operation Expenses	Other Expenses
Edgewood	216,750	6,156,818	1,242,057
North East	1,174,095	8,263,243	353,152
Alamo Heights	226,427	2,453,027	406,976
SAISD	2,490,888	28,158,770	2,786,896
Harlandale	369,193	5,307,753	316,209
Northside	712,036	4,370,234	3,282,007
South San	147,750	2,326,891	418,709

1967-68

(Exhibits 4-a, b, and c)

School District	Annual Payments of Bonded Indebtedness	Operation Expenses	Other Expenses
Edgewood	257,048	6,900,778	2,020,156
North East	1,123,928	10,123,309	5,441,682
Alamo Heights	234,585	2,818,146	232,971
SAISD	2,484,265	30,536,572	1,740,565
Harlandale	393,998	5,846,947	790,846
Northside	771,816	5,866,049	1,456,964
South San	228,742	2,736,203	801,192

II. This series of interrogatories relates to general population and school population in each district.

(a) The number of people in each district:

ANSWER: No information available.

(b) The number of students in each district going to district schools:

Answer: May be found for 1966-67 in Exhibit 5-a, *Annual Statistical Report, Part I,* 1966-67 school year. Data for 1967-68 are shown in computer printout labeled Exhibit 5-b. Tables are as follows:

Enrollment (1966-67)
Exhibit 5-a

School District	Elementary	Secondary	Total
Edgewood	17,785	5,022	22,807
North East	15,607	7,565	23,172
Alamo Heights	3,400	2,000	5,400
SAISD	55,046	23,717	78,763
Harlandale	11,951	4,496	16,447
Northside	10,497	3,302	13,799
South San	5,432	1,482	6,914

Enrollment (1967-68)
Exhibit 5-b

School District	Elementary	Secondary	Total
Edgewood	17,572	5,290	22,862
North East	16,794	8,452	25,246
Alamo Heights	3,307	2,125	5,432
SAISD	55,710	24,406	80,116
Harlandale	12,120	4,720	16,840
Northside	11,628	4,139	15,767
South San	6,025	1,603	7,628

(c) The number of students in each district going to schools other than district schools.

ANSWER: Not available.

(d) A breakdown of the student population showing the number of students in each grade.

ANSWER: Enrollments by district by grade for 1965-66, 1966-67, 1967-68 and 1968-69 are furnished in Exhibits 6-a, 6-b, 6-c, and 6-d. Tables are as follows:

Enrollment by Grade (1965-66)
(Exhibit 6-a)

School District	1	2	3	4	5	6	7	8	9	10	11	12	Special Education
Edgewood	2834	2364	2415	2200	2017	1993	1874	1611	1392	1129	913	733	364
North East	1715	1802	1934	1876	1795	1966	1970	1856	1712	1617	1598	1398	144
Alamo Hts.	416	396	389	422	395	400	513	454	515	445	455	419	80
SAISD	7778	7490	7205	6901	6833	6576	6991	6431	6232	6201	5006	4283	524
Harlandale	1643	1572	1513	1487	1381	1382	1404	1270	1163	1142	908	772	298
Northside	1206	1256	1272	1211	1166	1031	994	883	719	731	575	455	235
South San	842	733	659	637	610	594	478	409	403	359	255	199	208

(Exhibit 6-b)

Enrollment by Grade 1966-67)

School District	1	2	3	4	5	6	7	8	9	10	11	12	Special Education
Edgewood	2876	2453	2269	2301	2191	2011	1964	1720	1590	1253	966	846	367
North East	1777	1940	1894	2054	1982	1906	2147	2117	2094	1888	1664	1514	197
Alamo Hts.	397	421	416	424	404	427	435	512	538	481	426	432	87
SAISD	7709	7155	7072	6954	6649	6652	6780	6470	6166	6581	5298	4616	661
Harlandale	1714	1603	1514	1508	1473	1411	1391	1381	1235	1168	884	820	345
Northside	1320	1571	1323	1407	1311	1300	1159	1106	990	824	697	527	264
South San	918	768	699	684	662	636	599	466	433	355	274	227	193

Enrollment by Grade (1967-68)

(Exhibit 6-c)

School District	1	2	3	4	5	6	7	8	9	10	11	12	Special Education
Edgewood	2638	2408	2333	2197	2215	2149	1933	1699	1693	1329	1070	824	374
North East	1971	2056	2141	2121	2216	2109	2155	2299	2415	2065	1875	1647	176
Alamo Hts.	380	395	415	431	439	417	466	427	571	499	465	431	96
SAISD	7983	7057	7133	6860	6750	6752	7088	6478	6250	6563	5608	4789	805
Harlandale	1605	1658	1598	1525	1514	1439	1399	1414	1392	1162	917	827	390
Northside	1486	1500	1657	1480	1526	1394	1413	1172	1336	949	782	670	402
South San	978	875	793	772	703	662	644	598	504	396	306	215	182

Enrollment by Grade (1968-69)
(Exhibit 6-d)

School District	1	2	3	4	5	6	7	8	9	10	11	12	Special Education
Edgewood	2706	2325	2303	2300	2096	2214	2226	1694	1707	1344	1086	950	421
North East	1971	2168	2217	2219	2239	2295	2277	2198	2707	2360	1983	1832	241
Alamo Hts.	394	359	394	411	384	450	437	462	493	519	461	444	83
SAISD	7444	7159	7228	6879	6723	6736	7066	6555	6346	6793	5386	5077	982
Harlandale	1733	1572	1676	1563	1560	1524	1533	1421	1428	1270	960	868	407
Northside	1602	1745	1680	1763	1634	1656	1628	1435	1411	1277	917	760	468
South San.	932	948	862	831	775	712	652	600	559	420	314	246	164

III. This series of interrogatories relates to the income of the families in the respective school districts. Please provide:

(a) The average per capita income in each district.

(b) The average income of each wage earner in each district.

(c) The average number of school-aged children per family in each district.

ANSWER: The Texas Education Agency does not have the data requested for items (a), (b) or (c).

IV. This series of interrogatories relates to teacher characteristics in each school district. Please provide:

(a) Total number of teachers in each district.

ANSWER: The total number of teachers in each district for 1965-66, 1966-67, 1967-68 and 1968-69 are shown in Column IV-A of Exhibits 7-a, b, c, and d.

Total Number of Teachers
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69
Edgewood	759	780	864	841
North East	871	984	1,052	1,153
Alamo Heights	235	248	265	269
SAISD	2,687	2,746	2,809	2,841
Harlandale	612	620	651	681
Northside	430	508	627	696
South San	226	245	268	298

(b) The average number of teachers per school in each district.

ANSWER: No data available.

(c) The student-teacher ratio per grade in each district.

ANSWER: No data available.

(d) The percent of teachers with college degrees.

ANSWER: The percent of teachers with college degrees in each district for the four years listed in (a) is shown in Column IV-D of Exhibits 7-a, b, c, and d. Figures are as follow:

Percent of Teachers with College Degrees
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69
Edgewood	75.75%	74.87%	75.34%	80.02%
North East	100.00	99.49	99.52	100.00
Alamo Hts.	100.00	100.00	100.00	100.00
SAISD	98.36	97.92	98.18	98.76
Harlandale	97.38	95.16	94.77	96.47
Northside	99.53	99.40	99.36	99.71
South San	91.59	91.83	93.65	95.97

(e) The percent of teachers with bachelor degrees.

ANSWER: The percent of teachers with Bachelor's Degrees only is given in Column IV-E of the above listed Exhibits or 7-a, b, c, and d. The figures are as follows:

Percent of Teachers with Bachelor's Degrees
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69
Edgewood	58.76%	58.85%	60.64%	65.04%
North East	73.93	74.39	75.38	76.32
Alamo Hts.	60.42	60.08	59.62	62.45
SAISD	66.50	67.37	69.02	69.13
Harlandale	74.18	73.70	73.42	75.33
Northside	79.30	78.54	79.10	79.31
South San	68.14	74.28	76.49	81.54

(f) The percent of teachers with Masters Degrees.

ANSWER: The percent of teachers by districts with

Master's Degrees is shown in Column IV-F of the same Exhibits. Figures are as follows:

Percent of Teachers with Master's Degrees
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69
Edgewood	16.86%	16.02%	14.69%	14.98%
North East	25.94	25.20	24.14	23.59
Alamo Hts.	39.57	39.51	40.00	36.80
SAISD	31.81	30.55	29.08	29.56
Harlandale	23.20	21.45	21.35	21.14
Northside	20.23	20.86	20.25	20.40
South San	23.45	17.14	17.16	14.42

(g) The percent of teachers with Doctorate Degrees.

ANSWER: The percent of teachers with Doctorate Degrees is found in Column IV-G of the same four Exhibits 7-a, b, c, and d. Figures are as follows:

Percent of Teachers with Doctorate Degrees
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69
Edgewood	0%	0%	0%	0%
North East	0	0	0	0
Alamo Heights	0	.40	.37	.37
SAISD	.03	0	.03	.03
Northside	0	0	0	0
South San	0	0	0	0
Harlandale	0	0	0	0

(h) The percent of teachers with provisional certificates of education.

ANSWER: Not available.

(i) The percent of teachers without permanent certificates of education.

ANSWER: Not available.

(j) The percent of teachers without certificates of education.

ANSWER: The number of teachers with emergency permits for the 1966-67 school year by school district is shown in the last column of Exhibit 7-b. No tabulations are available by district for the other years.

Number of Emergency Permits
(Exhibit 7-b)

School District	1966-67
Edgewood	412
North East	82
Alamo Heights	28
SAISD	478
Harlandale	149
Northside	109
South San	99

(k) Any other credentials teachers in each school district have that would add to their qualifications.

ANSWER: No data available.

(l) The number and percentage of teachers in each school district that have, according to the standards of the School district, State Education Agency, Department of Health, Education and Welfare, or any other government agency, substandard preparation or substandard qualifications.

ANSWER: Those teachers on emergency permits as shown in Exhibit 7-b would be considered as having substandard preparation by this Agency. (See IV-j above)

(m) The salary scale of teachers, broken down according to qualifications and experience.

ANSWER: The Texas Education Agency does not collect salary schedules by school district. A report of

such schedules for 1968-69 as compiled by the Texas State Teachers' Association is included as Exhibit 8. Schedule is as follows:

Basic Salary Schedules for Teachers (1968-69)
(Exhibit 8)

School District	Degree	Minimum Salary	Maximum Salary
Edgewood	BA	$4,734	$5,904
	MA	5,040	6,912
North East	BA	5,400	7,310
	BA + 15 hours	5,500	7,460
	MA	5,800	8,550
	MA + 30 hours	6,100	8,850
	Doctorate	6,400	9,150
Alamo Hts.	BA	5,400	7,320
	MA	5,600	8,300
SAISD	BA	5,511	7,519
	MA	5,665	8,240
Harlandale	BA	5,200	6,354
	MA	5,500	7,362
Northside	BA	5,328	6,498
	MA	5,634	7,506
South San	BA	5,139	6,309
	MA	5,445	7,317

(n) Omitted

(o) The salary expenditure for teachers per student.

ANSWER: Salary expenditures for teachers per student for 1966-67, 1967-68, and 1968-69 are shown in Column IV-o of Exhibits 9-b, c, and d. Figures are as follows:

Salary Expenditures for Teachers per Student
(Exhibits 9-b, c, and d)

School District	1966-67	1967-68	1968-69
Edgewood	166.75	210.07	209.07
North East	216.75	276.00	287.93
Alamo Heights	258.18	357.95	372.07
SAISD	188.14	240.85	250.54
Harlandle	195.03	245.97	248.47
Northside	190.62	260.28	257.57
South San	187.69	230.10	237.54

(p) The turnover rate of teachers.

ANSWER: Valid data not available.

V. This series of interrogatories relates to student characteristics. Please provide:

(a) The number of students in each school district. Please describe how this figure is obtained.

ANSWER: The number of scholastics in each school district for 1966-67 is found in Exhibit 5-a. The same figures for 1967-68 are shown in Exhibit 5-b. A scholastic is a child between the ages of six (6) and seventeen (17) inclusive. Data was taken from the Census tabulations supplied to this Agency by local school districts. If (a) refers to pupils actually enrolled in public schools, the total for each district may be found in the same Exhibits. Figures are as follows:

Enrollment (1966-67)
(Exhibit 5-a)

School District	Elementary	Secondary	Total
Edgewood	17,785	5,022	22,807
North East	15,607	7,565	23,172
Alamo Heights	3,400	2,000	5,400
SAISD	55,046	23,717	78,763
Harlandale	11,951	4,496	16,447
Northside	10,497	3,302	13,799
South San	5,432	1,482	6,914

Enrollment (1967-68)
(Exhibit 5-b)

School District	Elementary	Secondary	Total
Edgewood	17,572	5,290	22,862
North East	16,794	8,452	25,246
Alamo Heights	3,307	2,125	5,432
SAISD	55,710	24,406	80,116
Harlandale	12,120	4,720	16,840
Northside	11,628	4,139	15,767
South San	6,025	1,603	7,628

Scholastic Population (1966-67)
(Exhibit 5-a)

School District	White	Negro	Total
Edgewood	21,403	1,290	22,693
North East	24,454	0	24,454
Alamo Heights	6,034	19	6,053
SAISD	79,899	11,041	90,940
Harlandale	17,723	19	17,742
Northside	12,955	109	13,064
South San	7,044	42	7,086

Scholastic Population (1967-68)
(Exhibit 5-b)

School District	White	Negro	Total
Edgewood	21,483	1,322	22,805
North East	25,625	8	25,633
Alamo Heights	6,075	19	6,094
SAISD	78,639	11,343	89,982
Harlandale	18,178	25	18,203
Northside	15,005	150	15,155
South San	7,324	34	7,358

(b) The number and percentage of drop-outs per year in each school district.

ANSWER: Data not available.

(c) The number of withdrawals per year in each district.

ANSWER: Data not available.

(d) The percentage of Spanish surname and/or Mexican-American students in each school and in each district.

(e) The percentage of Negro students in each school and in each district.

(f) The percentage of Anglo-American students in each school and in each district.

ANSWERS TO (d), (e), and (f): See Exhibit No. 10.

(Note: School campuses are listed by number . . . names not available on computer tape).

(Figures for IV-(d), (e), and (f) are as follows:

Please see next page for data.

Number and Percent of Anglo-American, Spanish Surname, and Negro Students in Each School and In Each District

(Exhibit 10)
(d), (e) and (f)

School District and Campus		(f) No. of Anglo-American Students	%	(e) No. of Negro Students	%	(d) No. of Mexican-American Students	%	Total Number of Students
Edgewood	001	43	2.19	164	8.35	1,755	89.44	1,962
	002	75	3.96	67	3.53	1,749	92.39	1,893
	003	11	.91	29	2.42	1,152	96.24	1,197
	041	56	10.54	20	3.76	455	85.68	531
	042	3	.34	0	0.00	859	99.65	862
	043	2	.16	3	.24	1,205	99.58	1,210
	044	0	.00	283	60.47	185	39.52	468
	045	27	2.55	16	1.51	1,014	95.93	1,057
	101	56	7.90	3	.42	649	91.66	708
	102	0	.00	1	.15	638	99.84	639
	103	1	.44	0	.00	222	99.55	223
	105	3	.37	1	.12	786	99.49	790
	106	7	.69	0	.00	999	99.30	1,006
	107	20	1.90	0	.00	1,031	98.09	1,051
	108	9	.72	8	.64	1,223	98.62	1,240
	109	0	.00	276	66.50	139	33.49	415
	110	6	.70	7	.82	837	98.47	850
	111	2	.45	238	53.72	203	45.82	443
	112	45	3.47	5	.38	1,246	96.14	1,296
	113	1	.15	0	.00	662	99.84	663
	114	15	1.32	11	.97	1,100	97.43	1,129
	115	10	1.56	0	.00	630	98.43	640
	116	466	55.01	183	21.60	174	20.54	847
	117	5	1.59	82	26.19	226	72.20	313
	184	0	.00	3	.38	785	99.61	788
Edgewood District Totals		863	3.88	1,400	6.30	19,924	89.66	22,221

Northeast	001	2,257	91.00	0	.00	207	8.34	1,992
	002	1,922	96.48	1	.05	65	3.26	2,239
	004	1,767	89.60	2	.10	191	9.68	1,972
	041	971	96.32	0	.00	35	3.47	1,008
	042	984	96.94	0	.00	31	3.05	1,015
	043	1,077	92.44	7	.60	75	6.43	1,165
	044	1,091	90.91	0	.00	107	8.91	1,200
	101	403	94.15	0	.00	25	5.84	428
	102	618	95.37	0	.00	29	4.47	648
	103	653	91.84	0	.00	55	7.73	711
	104	590	87.40	1	.14	84	12.44	675
	105	712	88.55	4	.49	73	9.07	804
	106	915	93.27	1	.10	65	6.62	981
	107	539	91.20	1	.16	50	8.46	591
	108	489	96.83	0	.00	15	2.97	505
	109	403	93.50	0	.00	19	4.40	431
	110	470	97.30	0	.00	12	2.48	483
	111	665	81.19	0	.00	149	18.19	819
	112	707	90.29	0	.00	71	9.06	783
	113	598	85.06	0	.00	104	14.79	703
	114	652	89.31	1	.13	69	9.45	730
	115	554	81.23	0	.00	124	18.18	682
	116	671	93.71	5	.69	38	5.30	716
	117	542	97.30	0	.00	11	1.97	557
	118	514	88.16	3	.51	45	7.71	583
	119	269	72.11	0	.00	104	27.88	373
	120	465	93.37	0	.00	30	6.02	498
Northeast District Totals		23,708	91.99	26	.10	1,903	7.38	25,772
Alamo Heights	001	1,729	91.87	5	.26	143	7.59	1,882
	041	760	85.58	2	.22	125	14.07	888
	101	765	95.62	10	1.25	24	3.00	800
	102	347	67.64	0	.00	163	31.77	513
	103	247	51.89	0	.00	253	47.91	528
	104	524	94.41	5	.90	23	4.14	555

Alamo Hts. Totals		4,399	85.15	22	.42	731	14.15	5,166
SAISD	001	99	4.78	628	30.35	1,339	64.71	2,069
	002	308	13.03	0	.00	2,052	86.87	2,362
	003	1,019	66.04	43	2.78	470	30.46	1,543
	004	9	.38	43	1.82	2,306	97.79	2,358
	005	1,891	71.22	313	11.78	447	16.83	2,655
	006	817	65.56	292	23.43	131	10.51	1,246
	008	42	1.79	4	.17	2,293	98.03	2,339
	009	0	.00	806	99.75	2	.24	808
	041	840	79.92	2	.19	208	19.79	1,051
	042	1	.07	5	.39	1,268	99.52	1,274
	043	500	61.05	174	21.24	143	17.46	819
	044	0	.00	363	99.45	2	.54	365
	045	0	.00	199	97.54	5	2.45	204
	046	18	2.35	548	71.72	198	25.91	764
	047	35	4.24	1	.12	786	95.27	825
	048	172	29.75	45	7.78	358	61.93	578
	049	37	2.45	71	4.70	1,397	92.57	1,509
	050	796	65.83	2	.16	411	33.99	1,209
	051	275	26.26	24	2.29	746	71.25	1,047
	052	346	36.07	32	3.33	572	59.64	959
	053	216	22.47	19	1.97	726	75.54	961
	054	34	3.97	508	59.41	310	36.25	855
	055	4	.34	5	.42	1,154	99.22	1,163
	056	0	.00	507	99.02	5	.97	512
	057	935	82.67	6	.53	187	16.53	1,131
	058	329	34.63	48	5.05	570	60.00	950
	059	687	67.68	1	.09	325	32.01	1,015
	060	437	59.05	210	28.37	84	11.35	740
	101	295	78.87	0	.00	77	20.58	374
	102	49	13.10	7	1.87	311	83.15	374
	103	368	70.36	1	.19	152	29.06	523
	104	11	1.55	0	.00	698	98.44	709
	105	395	81.44	0	.00	84	17.13	485
	106	85	18.24	16	3.43	363	77.89	466

107	1,649	47.14	121	3.45	1,679	47.99	3,498
108	30	3.59	21	2.51	780	93.52	834
110	5	.41	16	1.33	1,179	98.25	1,200
111	0	.00	9	.93	956	99.06	965
112	27	4.47	0	.00	575	95.19	604
113	54	7.71	153	21.85	493	70.42	700
114	0	.00	201	99.01	2	.98	203
115	34	4.14	0	.00	787	95.85	821
116	94	10.03	0	.00	841	89.75	937
117	141	29.80	2	.42	330	69.76	473
118	38	3.59	0	.00	1,019	96.40	1,057
119	0	.00	501	99.60	2	.39	503
120	182	84.65	20	9.30	13	6.04	215
121	14	2.02	0	.00	678	97.97	692
122	2	.45	316	71.81	122	22.72	440
123	57	13.47	5	1.18	361	85.34	423
124	245	63.47	12	3.10	127	32.90	386
125	499	77.12	17	2.62	131	20.24	647
126	247	59.80	1	.24	164	39.70	413
127	0	.00	1,009	97.58	25	2.41	1,034
128	28	26.41	0	.00	76	71.69	106
129	342	16.73	2	.09	1,696	82.97	2,044
130	0	.00	469	97.10	14	2.89	483
131	56	23.62	2	.84	179	75.52	237
132	13	3.15	147	35.67	249	60.43	412
133	0	.00	63	24.80	191	75.19	254
134	741	92.85	4	.50	52	6.51	798
135	227	36.49	24	3.85	364	58.52	622
136	72	8.53	0	.00	768	90.99	844
137	599	84.36	0	.00	107	15.07	710
138	15	4.34	1	.28	329	95.36	345
139	163	24.77	3	.45	490	74.46	658
140	13	1.96	0	.00	650	98.03	663
141	54	30.00	15	8.33	111	61.66	180
142	22	3.36	0	.00	631	96.63	653
143	98	19.36	5	.98	403	79.64	506

	144	54	5.07	8	.75	1,000	93.98	1,064
	145	9	3.47	0	.00	250	96.52	259
	146	154	64.97	3	1.26	79	33.23	237
	147	54	8.23	217	33.07	385	58.68	656
	148	293	43.99	1	.15	372	55.85	666
	149	15	2.31	8	1.23	624	96.29	648
	150	351	69.09	0	.00	152	29.92	508
	151	26	21.31	1	.81	95	77.86	122
	152	89	27.13	4	1.21	234	71.34	328
	153	0	.00	810	95.27	34	4.02	844
	154	25	5.47	8	1.75	424	92.77	457
	155	235	53.28	0	.00	205	46.48	441
	156	11	2.33	206	43.73	254	53.92	471
	157	63	5.86	18	1.67	994	92.46	1,075
	158	35	4.68	453	60.64	258	34.53	747
	159	257	74.92	9	2.62	65	18.95	343
	160	137	27.02	0	.00	370	72.97	507
	161	251	54.09	0	.00	212	45.68	464
	162	10	1.54	0	.00	636	98.45	646
	164	936	86.34	1	.09	147	13.56	1,084
	165	22	2.48	400	45.19	463	52.31	885
	166	0	.00	22	17.46	104	82.53	126
	167	241	64.78	0	.00	131	35.21	372
	168	154	20.05	211	27.47	398	51.82	768
	169	37	3.42	1	.09	1,043	96.48	1,081
	170	178	36.77	7	1.44	294	60.74	484
	171	0	.00	432	97.07	13	2.92	445
	172	0	.00	746	99.73	2	.26	748
	173	533	78.61	7	1.03	132	19.46	678
	174	163	38.44	0	.00	261	61.55	424
	175	160	26.53	0	.00	441	73.13	603
	176	168	44.56	2	.53	205	54.37	377
SAISD Totals		21,472	26.71	11,637	14.48	47,031	58.52	80,360
Harlandale	001	523	28.56	1	.05	1,307	71.38	1,831
	002	1,224	67.17	0	.00	598	32.82	1,822

	041	688	36.10	2	.10	1,180	63.78	1,850
	042	36	2.89	1	.08	1,206	97.02	1,243
	043	607	63.49	0	.00	347	36.29	956
	044	255	66.23	0	.00	130	33.76	385
	101	265	53.64	0	.00	227	45.95	494
	102	685	78.01	2	.22	191	21.75	878
	103	42	5.57	4	.53	708	93.89	754
	104	34	3.31	0	.00	993	96.68	1,027
	105	23	4.56	0	.00	481	95.43	504
	106	169	25.18	1	.14	501	74.66	671
	107	368	61.84	0	.00	227	38.15	595
	108	604	60.64	0	.00	392	39.35	996
	109	163	26.12	0	.00	460	73.71	624
	110	212	30.02	0	.00	494	69.97	706
	111	376	80.68	0	.00	90	19.31	466
	112	35	4.48	0	.00	746	95.51	781
	113	197	33.33	0	.00	394	66.66	591
	114	372	59.04	7	1.11	251	39.84	630
	115	36	36.73	0	.00	62	63.26	98
Harlandale Totals		6,894	38.50	18	.10	10,985	61.36	17,902
Northside	000	6	9.83	5	8.19	50	81.96	61
	001	820	79.53	19	1.84	189	18.33	1,011
	002	1,573	88.56	26	1.46	171	9.62	1,776
	003	1,279	92.14	2	.14	104	7.49	1,388
	041	1,004	93.13	1	.09	70	6.49	1,078
	042	638	87.51	26	3.56	63	8.64	729
	043	820	71.99	35	3.07	282	24.75	1,139
	101	364	47.21	20	2.59	387	50.19	771
	102	559	83.68	22	3.29	75	11.22	668
	103	373	91.87	3	.73	29	7.14	406
	104	242	80.93	0	.00	57	19.96	299
	105	751	83.25	8	.88	126	13.96	902
	106	708	88.72	28	3.50	60	7.51	798
	107	45	68.18	1	1.51	20	30.30	66
	108	358	83.84	3	.70	66	15.45	427

	109	394	85.46	0	.00	64	13.88	461
	110	32	58.18	2	3.63	21	38.18	55
	111	364	79.82	0	.00	88	19.29	456
	112	434	71.97	8	1.32	161	26.69	603
	113	553	90.35	16	2.61	42	6.86	612
	114	805	79.07	35	3.43	171	16.79	1,018
	115	712	93.19	0	.00	52	6.80	764
	116	11	100.00	0	.00	0	.00	11
	117	287	53.74	21	3.93	224	41.94	534
	119	339	94.16	1	.27	20	5.55	360
Northside Totals		13,471	82.07	282	1.71	2,592	15.79	16,413
South San	001	575	38.72	9	.60	869	58.51	1,485
	041	441	34.69	12	.94	815	64.12	127
	101	166	35.93	0	.00	296	64.06	462
	103	139	23.16	4	.66	456	76.00	600
	104	205	61.74	0	.00	127	38.25	332
	105	0	.00	2	.23	867	99.76	869
	106	23	6.26	0	.00	344	93.73	367
	107	90	17.64	22	4.31	377	77.84	510
	108	1,456	90.26	54	3.34	102	6.32	1,613
South San Totals		3,095	41.21	103	1.37	4,273	56.90	7,509

Totals of Number and Percent of Anglo-American Spanish Surname, and Negro Students by District
(1968-69)
(Exhibit 10)
(d), (e), and (f)

Edgewood	863	3.88	1,400	6.30	19,924	89.66	22,22
North East	23,708	91.99	26	.10	1,903	7.38	25,77
Alamo Heights	4,399	85.15	22	.42	731	14.15	5,16
SAISD	21,472	26.71	11,637	174.48	47,031	58.52	80,36
Harlandale	6,894	38.50	18	.10	10,985	61.36	17,90
Northside	13,471	82.07	282	1.71	2,592	15.79	16,41
South San	3,095	41.21	103	1.37	4,273	56.90	7,50

(g) The percentage of students in special education with the breakdown of the categories of special education.

ANSWER: Not available.

(h) The percentage of first graders who speak only Spanish.

ANSWER: Not available.

VI. This series of interrogatories relates to the physical plant in each school district. Please provide:

(a) The average age of the physical facilities in the district.

(b) The type of construction of the physical facilities in the district.

(c) The condition of the physical facilities in the district.

(d) The average number of students per class.

(e) The type of heating or air-conditioning system in the schools.

(f) The number of temporary structures.

(g) The land area that is used for school programs.

(h) The gymnasium space.

(i) The laboratory space.

(j) The number of substandard or dilapidated buildings.

ANSWER: The Texas Education Agency does not have sufficient data to respond to any of the questions listed.

VII. This series of interrogatories relates to the administrative and advisory personnel in each district. Please provide:

(a) The background qualifications and educational qualifications of each principal.

ANSWER: All full time principals are required to hold the appropriate administrators' certificate.

(b) The number of vice-principals in each school and each district and their qualifications and backgrounds.

ANSWER: The Texas Education Agency does not have available the exact number of vice-principals in each district since some vice-principals are actually reported as full-time principals for Foundation Program purposes. A vice-principal who spends the majority of his time in administration must hold an administrator's certificate.

(c) The number of counselors in each school and in each district and their backgrounds and qualifications.

ANSWER: School districts do not report counselors employed by school campus . . . only in total for the district. Columns B and M of Exhibits 9-a, b, c, and d show degree status of counselors by district for 1966-67—1968-69 inclusive. The sum of the two columns represents total counselors employed. Figures are as follows:

Counselors and Degree Status
(Exhibit 9-a, b, c, and d)

School District	Bachelor's Degree	Master's Degree	Doctorate's Degree	Total Counselors Per Year
Edgewood				
1966-67	1	5		6
1967-68	1	6		7
1968-69		5		5
TOTALS	2	16		18
North East				
1966-67	1	14		15

1967-68	1	15		16
1968-69		22		22
TOTALS	2	51		53
Alamo Heights				
1966-67		5		5
1967-68		8		8
1968-69		5		5
TOTALS		18		18
SAISD				
1966-67		29	1	30
1967-68		33		33
1968-69		29		29
TOTALS		91	1	92
Harlandale				
1966-67		7		7
1967-68		9		9
1968-69		8		8
TOTALS		24		24
Northside				
1966-67	1	8		9
1967-68		10		10
1968-69		9		9
TOTALS	1	27		28
South San				
1966-67		3		3
1967-68		4		4
1968-69	1	3	1	5
TOTALS	1	10	1	12

(d) The Counselor-Student ratio.

ANSWER: Column VII D of Exhibits 9-a, b, c, and d furnishes the counselor-student ratio for each district for the three year period. Figures are as follows:

Counselor-Student Ratio
(Exhibit 9-a, b, c, and d)

School District	1966-67	1967-68	1968-69
Edgewood	3,579	3,098	4,397
North East	1,486	1,516	1,171
Alamo Heights	1,030	645	1,018
SAISD	2,513	2,320	2,649
Harlandale	2,261	1,800	2,120
Northside	1,446	1,493	1,877
South San	2,092	1,752	1,496

NOTE: Numbers listed under the respective years represent the number of students per counselor.

(e) The degrees of the above persons.

ANSWER: Included in answer to number VII (c). Table is as follows:

Degrees of Counselors
(Exhibit 9-a, b, c, and d)

School District	1966-67	1967-68	1968-69
Edgewood			
Bachelor's	1	1	0
Master's	5	6	5
North East			
Bachelor's	1	1	0
Master's	14	15	22
Alamo Heights			
Bachelor's	0	0	0
Master's	5	8	5
SAISD			
Bachelor's	0	0	0
Master's	29	33	29
Doctorate	1	0	0
Harlandale			
Bachelor's	0	0	0
Master's	7	9	8

Northside			
Bachelor's	1	0	0
Master's	8	10	9
South San			
Bachelor's	0	0	1
Master's	3	4	3
Doctorate	0	0	1

(f) The salaries of the above persons.

ANSWER: Column F-M (last column on printout pages) of Exhibits 9-b, c, d shows total salaries paid counselors for 1966-67, 1967-68 and 1968-69. Average salary may be computed by dividing total salaries by number of counselors employed by a district. Salary figures in Exhibit 9-a (1965-66) should be disregarded as only Foundation Salary not actually paid was available for that year.

Total Salaries Paid Counselors (1966-67)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood	$5,640	$ 33,670	
North East	6,120	91,100	
Alamo Heights		34,410	
SAISD		220,669	$7,020
Harlandale	5,340	50,230	
South San		20,670	

Salaries Paid Counselors (1967-68)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood	$6,662	$ 48,268	
North East	8,278	123,248	
Alamo Heights		70,383	
SAISD		301,865	
Harlandale		69,250	
Northside		84,841	
South San		33,196	

Salaries Paid Counselors (1968-69)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood		$ 38,910	
North East		191,033	
Alamo Heights		45,866	
SAISD		271,965	
Harlandale		62,090	
Northside		86,145	
South San	$7,790	26,327	$7,870

Average Salariees Paid Counselors (1966-67)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood	$5,640	$ 6,734	
North East	6,120	6,507	
Alamo Heights		7,882	
SAISD		7,609	$7,020
Harlandale		7,964	
Northside	5,340	6,278	
South San		6,890	

Average Salaries Paid Counselors (1967-68)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood	$6,662	$ 8,044	
North East	8,278	8,216	
Alamo Heights		8,797	
SAISD		9,147	
Harlandale		7,694	
Northside		8,484	
South San		8,299	

Average Salaries Paid Counselors (1968-69)

School District	Bachelor's Degree	Master's Degree	Doctorate Degree
Edgewood		$ 7,782	
North East		8,683	
Alamo Heights		9,173	

SAISD		9,378	
Harlandale		7,761	
Northside		9,571	
South San	$7,790	8,775	$7,870

(i) The average daily class attendance in each district.

ANSWER: Column V-I of Exhibits 9-a, b, c, and d gives the percentage of attendance for each district for the four years, 1966-67, 1967-68, and 1968-69. Average daily class attendance is obtained by dividing the membership by the average daily attendance. Figures are as follows:

Average Daily Class Attendance
(Exhibits 9-a, b, c, and d)

School District	1966-67	1967-68	1968-69
Edgewood	92.84%	91.72%	92.88%
North East	94.96	94.76	94.67
Alamo Heights	94.52	93.82	93.77
SAISD	92.35	91.63	91.15
Harlandale	93.45	92.88	92.33
Northside	94.93	94.46	94.27
South San	93.67	93.82	93.28

(j) The average class size.

ANSWER: Not available.

(k) The number and percentage of students who graduate from high school.

ANSWER: See Exhibit No. 11. Table is as follows:

The Number and Percent of Students Who
Graduate from High School
(1968-69)

School District	12th Grade Enrollment	Graduates	Percent Graduates are of Enrollment
Edgewood	950	945	99.47

North East	1,832	1,751	95.58
Alamo Heights	444	437	98.42
SAISD	5,077	4,636	92.31
Harlandale	868	752	86.63
Northside	760	709	93.29
South San	246	231	93.90

(l) The numbers and grades in which drop-outs occur.

ANSWER: Not available.

(m) The percentage of students from each school district that attend college.

ANSWER: Not available.

(n) The percentage of students from each school district that graduate from college.

ANSWER: Not available.

VIII. This series of interrogatories relates to the courses offered in each school district. Please provide:

(a) The grade school curriculum provided.

ANSWER: Data not available.

(b) The junior high school curriculum provided.

ANSWER: Data not available.

(c) The high school curriculum provided.

ANSWER: Data not available.

(d) A list of the schools that have split shifts or other unusual class hours, giving such unusual class hours.

ANSWER: Data not available.

(e) The number of students taking each course with a breakdown of:

1. Percentage with Spanish surnames and/or Mexican-Americans

2. Percentage of Negro

3. Percentage of Anglo

ANSWER: Data not available.

(f) The special education courses provided for students of advanced ability, for slow learners, and for handicapped students, giving a breakdown of what courses are provided in each school.

ANSWER: Exhibits 12-a, b, c, d, e furnish special education unit allotments by type for each district having a special education program for the five years 1965-66—1969-70 inclusive.

Blind/Partially Blind
(Exhibits 12-a, b, c, d, and e)

School District	No. of Blind Pupils	No. of Teachers	No. of Partially Sighted Pupils	No. of Teachers
Edgewood				
1965-66	0	0	0	0
1966-67	0	0	0	0
1967-68	0	0	0	0
1968-69	0	0	0	0
1969-70	0	0	0	0
North East				
1965-66	0	0	0	0
1966-67	19	2	8	1
1967-68	14	2	12	1
1968-69	15	2	11	1
1969-70	19	2	8	1
Alamo Heights				
1965-66	0	0	0	0
1966-67	0	0	0	0
1967-68	0	0	0	0

1968-69	0	0	0	0
1969-70	0	0	0	0
SAISD				
1965-66	0	0	0	0
1966-67	14	2	13	1
1967-68	0	0	0	0
1968-69	0	0	0	0
1969-70	0	0	0	0
Harlandale				
1965-66	0	0	14	1
1966-67	0	0	14	1
1967-68	0	0	24	2
1968-69	0	0	0	0
1969-70	0	0	0	0
Northside				
1965-66	0	0	0	0
1966-67	0	0	0	0
1967-68	0	0	0	0
1968-69	0	0	0	0
1969-70	0	0	0	0
South San				
1965-66	0	0	0	0
1966-67	0	0	0	0
1967-68	0	0	0	0
1968-69	0	0	0	0
1969-70	0	0	0	0

Minimally Brain Injured/School Room
(Exhibits 12-a, b, c, d, and e)

School District	No. of Minimally Brain Injured Pupils	No. of Teachers	No. of School Room Pupils	No. of Teachers
Edgewood				
1965-66	0	0	0	0
1966-67	0	0	0	0
1967-68	0	0	0	0
1968-69	10	1	0	0

1969-70	14	2	0	0
North East				
1965-66	246	25	17	2
1966-67	254	26	18	2
1967-68	284	29	28	3
1968-69	329	33	29	3
1969-70	400	39	31	3
Alamo Heights				
1965-66	37	4	0	0
1966-67	66	7	0	0
1967-68	94	9	0	0
1968-69	116	12	0	0
1969-70	116	12	0	0
SAISD				
1965-66	80	8	0	0
1966-67	118	12	136	9
1967-68	135	14	136	8
1968-69	140	14	156	8
1969-70	185	18	112	8

IX. This series of interrogatories relates to the books provided in each school district. Please provide:

(a) As to library books:

1. The average age of each book.

2. Any data you may have relating to the quality of each book.

3. The number of book titles and the number of books, giving the number of students broken down into each school.

4. The dollar amount spent on books.

5. The dollar amount per student spent on books.

ANSWER to (a) 1, 2, 3, 4 and 5: Data are not available to furnish the answers to the questions listed. Reports to this Agency combine Library and Audio-Visual materials expenditures.

(b) As to students' books:

1. How the books are selected:

ANSWER: The chairman of the State Board of Education gives public notice six months in advance of the meeting in which the adoption of new texts is made. New adoptions are made under the Textbook Law or when a contract expires. Interested publishers may secure complete information from the Textbook Division. The date for annual adoptions is the second Monday in November, however the State Board may choose another date.

Procedurally, the State Board of Education selects 15 persons from a list recommended by the State Commissioner of Education to serve on the State Textbook Committee.

Each person shall be an experienced and active education and a majority of the members shall be classroom teachers.

The State Textbook Committee recommends to the commission of Education a complete list of approved textbooks for the various grade levels and subjects. The Commissioner may remove books from the recommended list, however, he cannot add any book to the list. Also he cannot reduce the list to a single adoption.

The Commissioner then submits the list as amended to the State Board of Education which may also remove but not add any books. Contracts awarded by the State may be from 1 to 6 years.

A committee of teachers from each district appointed for one (1) year may then choose the textbooks to be used in their local district. This local committee chooses from the approved list of textbooks. After their selection is made, this local committee submits a report

which dictates their choice to the Textbook Committee. This report is final and not subject to change. Texts selected are to be used for the entire contract period and cannot be changed during that period.

2. The average age of the books in use.

ANSWER: Article 2842 states among other things "The contracts for the total number of different texts adopted shall be so arranged that contracts on not more than one-sixth of the total number of different basal subjects shall expire in any one year, or shall be changed in any one year." This statement, along with the readoption provisions of the same article, gives the State Board latitude in determining length of adoptions and readoption contracts. The average age of textbooks under current contract is about 3½ years.

3. The copyright date of the books in use.

ANSWER: Copyright of each textbook under contract can be found in Bulletin 681, Current Adoption Textbooks 1969-70. Generally, copyrights of texts in science, mathematics, language arts, and social studies carry recent copyrights. Band and orchestra, vocal music, and art carry older copyrights. The range of copyrights in band and orchestra is from 1943 to 1963, while the range in science for grades 1 thru high school (with the exception of physics) is 1963 through 1968.

(No figures by district)

4. The number of books in use.

ANSWER: Column IX(B) 4 of Exhibit 13-a (ocmputer printout shows total number of State owned textbooks in each school district as of December 1, 1969.)

Figures are as follows:

The Number of State-Owned Textbooks in Use by District (1969)
(Exhibit 13-a)

School District	Number of Books
Edgewood	319,757
North East	360,808
Alamo Heights	64,405
SAISD	958,496
Harlandale	241,660
Northside	257,589
South San	115,623

Total Number of State-Owned Books, Total Cost, and Average Cost Per Book (1969)

Total Number of State-Owned Books	Total Cost	Average Cost Per Book
33,613,080	$83,804,063	$2.49

5. The dollar amount spent on books, further broken down into the amount per student spent on books.

ANSWER: Column IV(B) 5 of the computer printout shows total amount of state funds spent by district for state-owned textbooks on hand as of December 1, 1969. Page two of Exhibit 13-a shows average amount spent per student for textbooks for each of the four years, 1965-55 through 1968-69 inclusive. Figares are as follows:

Dollar Amount Spent on Books by District (1969)

School District	Total $ Amount	Dollar Amount Per Student
Edgewood	$ 754,928.73	
North East	896,448.84	
Alamo Heights	159,472.18	
SAISD	2,294,151.46	
Harlandale	554,417.29	
Northside	615,930.59	
South San	266,244.28	

NOTE: (No figures were supplied as to dollar amount per student spent by the state for use of books. Also, no figures for enrollment were provided for the year 1969 making it impossible to compute the dollar amount per student.)

The following tabulation indicates by year from 1965-66 through 1968-69 the total amount of money spent for textbooks, total enrollment, and cost per child enrolled.

Year	Total Spent	Total Enrollment	Amount Spent Per Scholastic
1965-66	$16,477,446	2,423,819	$6.79
1966-67	16,301,991	2,464,682	6.61
1967-68	15,961,258	2,612,000	6.11
1968-69	17,027,870	2,667,000	6.38

X. This series of interrogatories relates to services provided by each school district.

Please provide:

(a) The number of registered nurses employed full-time by each school district.

ANSWER: Exhibits 7-a, b, c, and d show the number of registered nurses employed by each school for the four years, 1965-66, 1966-67, 1967-68, and 1968-69. Figures are as follows:

Number of Registered Nurses Employed Full-Time
(Exhibits 7-a, b, c, and d)

School District	1965-66	1966-67	1967-68	1968-69	Totals
Edgewood	5	8	10	7	30
North East	6	6	7	8	27
Alamo Heights	2	2	2	2	8
SAISD	21	46	50	50	167
Harlandale	3	2	3	3	11

Northside	1	1	1	1	4
South San	1	2	2	3	8

(b) The number of registered nurses employed part-time by each district, broken down into the number of hours of work.

ANSWER: Not available.

(c) The availability of doctors for the students.

ANSWER: Not available.

(d) The availability of dentists for the students.

ANSWER: Not available.

(e) A description of infirmary facilities provided.

ANSWER: Not available.

(f) Whether or not free lunch facilities are provided.

ANSWER: Exhibit 14-b lists total lunches served by school districts participating in the National School Lunch Program for October, 1969. The second column of the Exhibit furnishes the number of lunches served free or at reduced prices to pupils.

Total Number of Lunches and Free Lunches
(October 1969)
(Exhibit 14-b)

School District	Total No. of Lunches Served	Number of Free or Reduced Lunches
Edgewood	175,362	27,478
North East	277,725	3,516
Alamo Heights	4,977	1,070
SAISD	no figures	no figures
Harlandale	142,130	20,624
Northside	211,850	19,464
South San	57,386	13,565

(g) Whether or not free milk is provided.

ANSWER: Exhibit 14-a lists the school districts for 1969-70 and the number of school campuses in each participating in the Special Milk Program. This program provides a maximum reimbursement to districts of four (4) cents per half pint of milk purchased in order that the milk may be sold more cheaply to pupils and/or given to needy children. United States Department of Agriculture regulations do not require that the actual number of half pints of milk given to children be reported.

Districts and No. of Schools Participating in Special Milk Program

School District	Number of Schools
Edgewood	24
North East	28
Alamo Heights	6
SAISD	102
Harlandale	20
Northside	27
South San	9

(h) Please list any other services available.

ANSWER: Not available.

XII. The series of interrogatories relates to special equipment provided for education.

Please provide:

(a) What visual aid is provided in each school, its value, and average age.

ANSWER: Not available.

(b) What television equipment is provided in each school, its value, and average age.

ANSWER: Not available.

(c) What recording equipment is provided in each school, its value, and average age.

ANSWER: Not available.

(d) What computer equipment is provided in each school, its value, and average age.

ANSWER: Not available.

(e) What other special equipment is provided in each school, giving use, dollar value, and average age.

ANSWER: Not available.

XIII. This series of interrogatories relates to extra-curricular activities and facilities available in each school district. Please provide:

(a) A description of the music facilities and activities in each school.

ANSWER: Not available.

(b) A description of the drama facilities and activities in each school.

ANSWER: Not available.

(c) A description of the art facilities and activities in each school.

ANSWER: Not available.

(d) A description of any other extra-curricular cultural or educational activities provided by each school.

ANSWER: Not available.

XIV. This series of interrogatories relates to the hours of education provided in each school district. Please provide:

(a) The hours of extra-curricular activity as described in interrogatory XIII above.

ANSWER: Data not available.

(b) The hours of classes in each school and a description of the split shifts or any other unusual class hours.

ANSWER: Data not available.

Number and Percent of Anglo-American, Spanish Surname, and Negro Students in Each School and in Each District

(Exhibit 10)
(d), (e) and (f)

School District and Campus		(f) No. of Anglo-American Students	%	(e) No. of Negro Students	%	(d) No. of Mexican-American Students	%	Total Number of Students
Edgewood	001	43	2.19	164	8.35	1,755	89.44	1,962
	002	75	3.96	67	3.53	1,749	92.39	1,893
	003	11	.91	29	2.42	1,152	96.24	1,197
	041	56	10.54	20	3.76	455	85.68	531
	042	3	.34	0	0.00	859	99.65	862
	043	2	.16	3	.24	1,205	99.58	1,210
	044	0	.00	283	60.47	185	39.52	468
	045	27	2.55	16	1.51	1,014	95.93	1,057
	101	56	7.90	3	.42	649	91.66	708
	102	0	.00	1	.15	638	99.84	639
	103	1	.44	0	.00	222	99.55	223
	105	3	.37	1	.12	786	99.49	790
	106	7	.69	0	.00	999	99.30	1,006
	107	20	1.90	0	.00	1,031	98.09	1,051
	108	9	.72	8	.64	1,223	98.62	1,240
	109	0	.00	276	66.50	139	33.49	415
	110	6	.70	7	.82	837	98.47	850
	111	2	.45	238	53.72	203	45.82	443
	112	45	3.47	5	.38	1,246	96.14	1,296
	113	1	.15	0	.00	662	99.84	663
	114	15	1.32	11	.97	1,100	97.43	1,129
	115	10	1.56	0	.00	630	98.43	640
	116	466	55.01	183	21.60	174	20.54	847
	117	5	1.59	82	26.19	226	72.20	313
	184	0	.00	3	.38	785	99.61	788
Edgewood District Totals		863	3.88	1,400	6.30	19,924	89.66	22,221

North East	001	2,257	91.00	0	.00	207	8.34	1,992
	002	1,922	96.48	1	.05	65	3.26	2,239
	004	1,767	89.60	2	.10	191	9.68	1,972
	041	971	96.32	0	.00	35	3.47	1,008
	042	984	96.94	0	.00	31	3.05	1,015
	043	1,077	92.44	7	.60	75	6.43	1,165
	044	1,091	90.91	0	.00	107	8.91	1,200
	101	403	94.15	0	.00	25	5.84	428
	102	618	95.37	0	.00	29	4.47	648
	103	653	91.84	0	.00	55	7.73	711
	104	590	87.40	1	.14	84	12.44	675
	105	712	88.55	4	.49	73	9.07	804
	106	915	93.27	1	.10	65	6.62	981
	107	539	91.20	1	.16	50	8.46	591
	108	489	96.83	0	.00	15	2.97	505
	109	403	93.50	0	.00	19	4.40	431
	110	470	97.30	0	.00	12	2.48	483
	111	665	81.19	0	.00	149	18.19	819
	112	707	90.29	0	.00	71	9.06	783
	113	598	85.06	0	.00	104	14.79	703
	114	652	89.31	1	.13	69	9.45	730
	115	554	81.23	0	.00	124	18.18	682
	116	671	93.71	5	.69	38	5.30	716
	117	542	97.30	0	.00	11	1.97	557
	118	514	88.16	3	.51	45	7.71	583
	119	269	72.11	0	.00	104	27.88	373
	120	465	93.37	0	.00	30	6.02	498
North East District Totals		23,708	91.99	26	.10	1,903	7.38	25,772
Alamo Heights	001	1,729	91.87	5	.26	143	7.59	1,882
	041	760	85.58	2	.22	125	14.07	888
	101	765	95.62	10	1.25	24	3.00	800
	102	347	67.64	0	.00	163	31.77	513
	103	247	51.89	0	.00	253	47.91	528
	104	524	94.41	5	.90	23	4.14	555

Alamo Heights Totals		4,339	85.15	22	.42	731	14.15	5,166
SAISD	001	99	4.78	628	30.35	1,339	64.71	2,069
	002	308	13.03	0	.00	2,052	86.87	2,362
	003	1,019	66.04	43	2.78	470	30.46	1,543
	004	9	.38	43	1.82	2,306	97.79	2,358
	005	1,891	71.22	313	11.78	447	16.83	2,655
	006	817	65.56	292	23.43	131	10.51	1,246
	008	42	1.79	4	.17	2,293	98.03	2,339
	009	0	.00	806	99.75	2	.24	808
	041	840	79.92	2	.19	208	19.79	1,051
	042	1	.07	5	.39	1,268	99.52	1,274
	043	500	61.05	174	21.24	143	17.46	819
	044	0	.00	363	99.45	2	.54	365
	045	0	.00	199	97.54	5	2.45	204
	046	18	2.35	548	71.72	198	25.91	764
	047	35	4.24	1	.12	786	95.27	825
	048	172	29.75	45	7.78	358	61.93	578
	049	37	2.45	71	4.70	1,397	92.57	1,509
	050	796	65.83	2	.16	411	33.99	1,209
	051	275	26.26	24	2.29	746	71.25	1,047
	052	346	36.07	32	3.33	572	59.64	959
	053	216	22.47	19	1.97	726	75.54	961
	054	34	3.97	508	59.41	310	36.25	855
	055	4	.34	5	.42	1,154	99.22	1,163
	056	0	.00	507	99.02	5	.97	512
	057	935	82.67	6	.53	187	16.53	1,131
	058	329	34.63	48	5.05	570	60.00	950
	059	687	67.68	1	.09	325	32.01	1,015
	060	437	59.05	210	28.37	84	11.35	740
	101	295	78.87	0	.00	77	20.58	374
	102	49	13.10	7	1.87	311	83.15	374
	103	368	70.36	1	.19	152	29.06	523
	104	11	1.55	0	.00	698	98.44	709
	105	395	81.44	0	.00	84	17.13	485
	106	85	18.24	16	3.43	363	77.89	466

107	1,649	47.14	121	3.45	1,679	47.99	3,498
108	30	3.59	21	2.51	780	93.52	834
110	5	.41	16	1.33	1,179	98.25	1,200
111	0	.00	9	.93	956	99.06	965
112	27	4.47	0	.00	575	95.19	604
113	54	7.71	153	21.85	493	70.42	700
114	0	.00	201	99.01	2	.98	203
115	34	4.14	0	.00	787	95.85	821
116	94	10.03	0	.00	841	89.75	937
117	141	29.80	2	.42	330	69.76	473
118	38	3.59	0	.00	1,019	96.40	1,057
119	0	.00	501	99.60	2	.39	503
120	182	84.65	20	9.30	13	6.04	215
121	14	2.02	0	.00	678	97.97	692
122	2	.45	316	71.81	122	22.72	440
123	57	13.47	5	1.18	361	85.34	423
124	245	63.47	12	3.10	127	32.90	386
125	499	77.12	17	2.62	131	20.24	647
126	247	59.80	1	.24	164	39.70	413
127	0	.00	1,009	97.58	25	2.41	1,034
128	28	26.41	0	.00	76	71.69	106
129	342	16.73	2	.09	1,696	82.97	2,044
130	0	.00	469	97.10	14	2.89	483
131	56	23.62	2	.84	179	75.52	237
132	13	3.15	147	35.67	249	60.43	412
133	0	.00	63	24.80	191	75.19	254
134	741	92.85	4	.50	52	6.51	798
135	227	36.49	24	3.85	364	58.52	622
136	72	8.53	0	.00	768	90.99	844
137	599	84.36	0	.00	107	15.07	710
138	15	4.34	1	.28	329	95.36	345
139	163	24.77	3	.45	490	74.46	658
140	13	1.96	0	.00	650	98.03	663
141	54	30.00	15	8.33	111	61.66	180
142	22	3.36	0	.00	631	96.63	653
143	98	19.36	5	.98	403	79.64	506

	144	54	5.07	8	.75	1,000	93.98	1,064
	145	9	3.47	0	.00	250	96.52	259
	146	154	64.97	3	1.26	79	33.23	237
	147	54	8.23	217	33.07	385	58.68	656
	148	293	43.99	1	.15	372	55.85	666
	149	15	2.31	8	1.23	624	96.29	648
	150	351	69.09	0	.00	152	29.92	508
	151	26	21.31	1	.81	95	77.86	122
	152	89	27.13	4	1.21	234	71.34	328
	153	0	.00	810	95.27	34	4.02	844
	154	25	5.47	8	1.75	424	92.77	457
	155	235	53.28	0	.00	205	46.48	441
	156	11	2.33	206	43.73	254	53.92	471
	157	63	5.86	18	1.67	994	92.46	1,075
	158	35	4.68	453	60.64	258	34.53	747
	159	257	74.92	9	2.62	65	18.95	343
	160	137	27.02	0	.00	370	72.97	507
	161	251	54.09	0	.00	212	45.68	464
	162	10	1.54	0	.00	636	98.45	646
	164	936	86.34	1	.09	147	13.56	1,084
	165	22	2.48	400	45.19	463	52.31	885
	166	0	.00	22	17.46	104	82.53	126
	167	241	64.78	0	.00	131	35.21	372
	168	154	20.05	211	27.47	398	51.82	768
	169	37	3.42	1	.09	1,043	96.48	1,081
	170	178	36.77	7	1.44	294	60.74	484
	171	0	.00	432	97.07	13	2.92	445
	172	0	.00	746	99.73	2	.26	748
	173	533	78.61	7	1.03	132	19.46	678
	174	163	38.44	0	.00	261	61.55	424
	175	160	26.53	0	.00	441	73.13	603
	176	168	44.56	2	.53	205	54.37	377
SAISD Totals		21,472	26.71	11,637	14.48	47,031	58.52	80,360
Harlandale	001	523	28.56	1	.05	1,307	71.38	1,831
	002	1,224	67.17	0	.00	598	32.82	1,822

	041	688	36.10	2	.10	1,180	63.78	1,850
	042	36	2.89	1	.08	1,206	97.02	1,243
	043	607	63.49	0	.00	347	36.29	956
	044	255	66.23	0	.00	130	33.76	385
	101	265	53.64	0	.00	227	45.95	494
	102	685	78.01	2	.22	191	21.75	878
	103	42	5.57	4	.53	708	93.89	754
	104	34	3.31	0	.00	993	96.68	1,027
	105	23	4.56	0	.00	481	95.43	504
	106	169	25.18	1	.14	501	74.66	671
	107	368	61.84	0	.00	227	38.15	595
	108	604	60.64	0	.00	392	39.35	996
	109	163	26.12	0	.00	460	73.71	624
	110	212	30.02	0	.00	494	69.97	706
	111	376	80.68	0	.00	90	19.31	466
	112	35	4.48	0	.00	746	95.51	781
	113	197	33.33	0	.00	394	66.66	591
	114	372	59.04	7	1.11	251	39.84	630
	115	36	36.73	0	.00	62	63.26	98
Harlandale Totals		6,894	38.50	18	.10	10,985	61.36	17,902
North-side	000	6	9.83	5	8.19	50	81.96	61
	001	820	79.53	19	1.84	189	18.33	1,031
	002	1,573	88.56	26	1.46	171	9.62	1,776
	003	1,279	92.14	2	.14	104	7.49	1,388
	041	1,004	93.13	1	.09	70	6.49	1,078
	042	638	87.51	26	3.56	63	8.64	729
	043	820	71.99	35	3.07	282	24.75	1,139
	101	364	47.21	20	2.59	387	50.19	771
	102	559	83.68	22	3.29	75	11.22	668
	103	373	91.87	3	.73	29	7.14	406
	104	242	80.93	0	.00	57	19.96	299
	105	751	83.25	8	.88	126	13.96	902
	106	708	88.72	28	3.50	60	7.51	798
	107	45	68.18	1	1.51	20	30.30	66
	108	358	83.84	3	.70	66	15.45	427

109	394	85.46	0	.00	64	13.88	461
110	32	58.18	2	3.63	21	38.18	55
111	364	79.82	0	.00	88	19.29	456
112	434	71.97	8	1.32	161	26.69	603
113	553	90.35	16	2.61	42	6.86	612
114	805	79.07	35	3.43	171	16.79	1,018
115	712	93.19	0	.00	52	6.80	764
116	11	100.00	0	.00	0	.00	11
117	287	53.74	21	3.93	224	41.94	534
119	339	94.16	1	.27	20	5.55	360
Northside Totals	13,471	82.07	282	1.71	2,592	15.79	16,413

XV. This series of interrogatories relates to achievement of the children of various school districts based on testing. Please provide:

(a) Tests relating to achievement given to students in each school.

ANSWER: Data not available.

(b) The results of those tests.

ANSWER: Data not available.

Those districts participating on a voluntary basis in the N.D.E.A. Title V State Testing Program for grades 7 and 9 are not required to report results to this Agency.

(c) What testing is objective and what testing is subjective.

ANSWER: Data not available.

(d) Whether or not instruction is provided to assist students in taking tests which qualify the student for college entrance.

ANSWER: Data not available.

XVI. This series of interrogatories relates only to school districts that are in part, within the City of San Antonio and/or Bexar County, Texas. Such schools are: Alamo Heights Independent School District, Boerne Independent School District, Comal Independent School District, East Central Independent School District, Edgewood Independent School District, Floresville Independent School District, Harlandale Independent School District, Judson Independent School District, Medina Valley Independent School District, North East Independent School District, Northside Independent School District, San Antonio Independent School District, Schertz-Cibolo Universal City Independent School District, Somerset Independent School District. Please provide:

(a) The number of students in each district that reside in Bexar County, Texas.

ANSWER: See Exhibit 15—Reported totals are scholastic, not students. Data on residence of students enrolled not available. Figures are at follows:

Exhibit 15

Number of Scholastics Residing in Bexar County

District	1965-66	1966-67	1967-68	1968-69	1969-70
Alamo Heights	6230	6017	6052	5870	5540
Boerne	35	29	30	31	29
Comal	62	68	67	76	92
East Central	2642	2740	3025	3042	3354
Edgewood	22108	22730	22830	24158	24464
Floresville	0	0	0	0	0
Harlandale	17618	17757	18210	18361	18846
Judson	1151	1329	1509	1993	2578
Medina Valley	205	225	235	223	328
Northeast	25596	24495	25664	27193	28340
Northside	11551	13103	15100	17133	19122
San Antonio	91906	90837	89922	88989	87158

Schertz-Cibolo	1453	1888	1996	2106	2063
Somerset	529	535	571	643	658

(b) The number of students outside Bexar County, Texas.

ANSWER: See Exhibit 15—(again, scholastics not students enrolled). Figures are as follows:

Exhibit 15

Number of Scholastics Residing Outside of Bexar County

District	1965-66	1966-67	1967-68	1968-69	1969-70
Alamo Heights	0	0	0	0	0
Boerne	928	921	911	908	973
Comal	1427	1463	1465	1563	1614
East Central	0	0	0	0	0
Edgewood	0	0	0	0	0
Floresville	1796	1801	1822	1895	1915
Harlandale	0	0	0	0	0
Judson	0	0	0	0	0
Medina Valley	1108	1098	1116	1067	1152
Northeast	0	0	0	0	0
Northside	2	1	0	0	0
San Antonio	0	0	0	0	0
Schertz-Cibolo	800	935	1017	1028	1158
Somerset	79	78	69	80	66

[NOTE: South San has been excluded from both (a) and (b)]

(c) A list of the schools, if any, with respect to each such district, located in Bexar County, Texas, and the number of students in each school.

ANSWER: Intent of question not clear. Enrollment as of October, 1968 by school campus (number of campus—not name), for each each district located wholly in Bexar County may be secured from Exhibit No. 10.

(d) The number of students in each such district that reside in San Antonio, Texas.

ANSWER: Data not available.

(e) A list of the schools, if any, with respect to each such district, located in San Antonio, Texas, and the number of students in each school.

ANSWER: Data not available.

(f) With regard to the schools listed in (c) above, please describe which are located in the City of San Antonio, Texas.

ANSWER: Data not available.

(g) If you have a map available of Bexar County, Texas, which provides the location of each school in the County, please attach it to your answers.

ANSWER: Small map showing school districts in Bexar County (Exhibit 16) is included. Map does not show location of school campuses.

(h) If you have a population map available of Bexar County, Texas, which shows the school population density or general population density, please attach it to your answers.

ANSWER: Map not available.

XVII. This series of interrogatories relates only to the independent school districts in Bexar County, Texas. Please provide:

(a) When each was established.

ANSWER: The answer is as follows:

Edgewood C S D #041 was converted to Edgewood I S D #905 by election on 01-21-50.

Alamo Hts. was incorporated by election on 11-24-23.

North East I S D was created from North East R H S D #710 by election on 03-09-55.

S A I S D was created by Twenty-Eighth Legislature, 1903, page 198, effective 07-01-03.

Harlandale was incorporated by election of 01-26-24.

Northside I S D #915 was created from Northside R H S D #715 by election on 06-13-55.

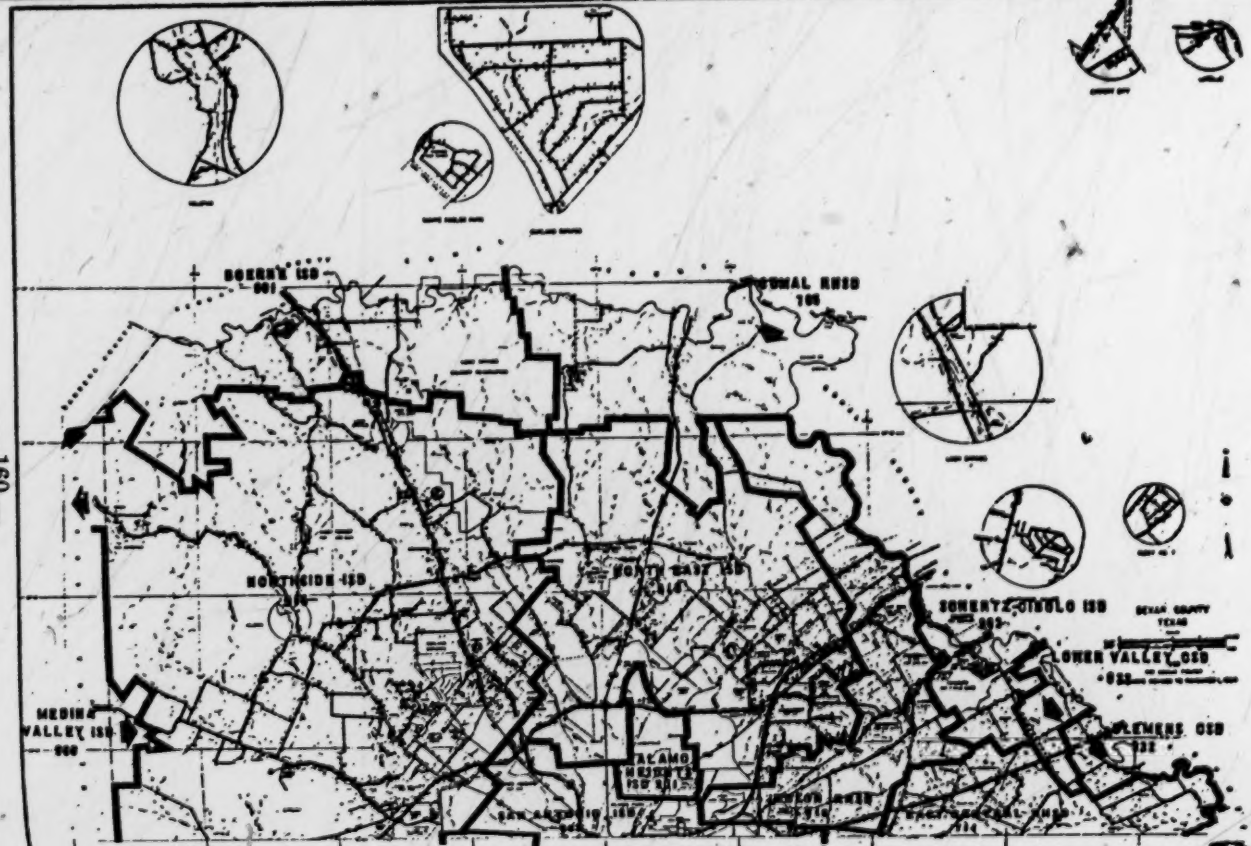
South San (no figures or information available).

East Central C S D was created on 03-15-49 by consolidation through election.

Judson was created by County Board action of 06-25-58.

Somerset was created by the Third called Session of the Thirty-Sixth Legislature, effective 06-18-20.

GENERAL HIGHWAY MAP
BEXAR COUNTY
TEXAS
FLORESVILLE ISD
261


NORTHSIDE ISD
SOUTH EAST ISD
SOMERSET-ONEIDA ISD
LOWER VALLEY CSD
MEDINA VALLEY ISD
ALAMO HEIGHTS ISD
SAN ANTONIO
EAST CENTRAL ISD

(b) Under what law each was established.

ANSWER: Information available as to the following Districts only:

SAISD — Twenty-Eighth Legislature, 1903, page 198, effective 07-01-03.

Somerset—Third called Session of the Thirty-Sixth Legislature, effective 06-18-20.

Floresville ISD—was created by Regular Session of the Thirty-Eighth Legislature, page 18 of Special Laws, effective 02-07-23.

(c) Under what law each is in existence at the present time.

ANSWER: Information not available.

(d) The history of expansion of the school district boundary lines.

ANSWER: No specific data as to expansion of boundary lines, however, there is information pertaining to consolidation.

(e) The history of expansion of the number of students.

ANSWER: The last page of Exhibit 17 shows pupil enrollment by district for 1950-51, 1955-56, 1960-61, 1965-66, and 1968-69. Table is as follows:

(Exhibit 17)

Enrollment

District	1950	1955	1960	1965	1968
Edgewood	4,607	10,904	15,755	21,838	23,372
Northeast	524	4,465	12,180	21,383	26,707
Alamo Heights	2,304	3,719	4,901	5,299	5,291
SAISD	48,965	64,205	75,282	78,451	80,374
Harlandale	5,778	9,589	12,923	15,935	17,560

Northside	822	1,745	4,484	11,734	17,976
South San		No figures available			
East Central	990	1,278	1,441	2,265	2,926
Judson	—	—	612	1,220	2,442
Somerset	391	407	488	625	788
Boerne	560	736	933	1,028	1,135
Comal County	—	—	1,158	1,537	1,745
Floresville	849	1,387	1,522	1,634	1,836
Medina Valley	—	—	687	885	1,546
Shertz-Cibolo	—	893	1,546	2,842	3,524

(f) The consolidations with other school districts, listing dates of occurrence; with what district or districts it occurred, and the method of consolidation.

ANSWER: Details are as follows:

Edgewood CSD #041 was converted to Edgewood ISD #905 by election on 01-21-50.

North East RHSD was created through consolidation by election on 08-03-49. Blanco Rd. CSD #006, Seay CSD #007, Olmos CSD #009, Lookout Valley CSD #010, Serna CSD #011, Coker CSD #050, and Salado Valley CSD#052 were consolidated to form North East RHSD #710. North East RHSD #710 by election on 03-09-55.

Alamo Heights was incorporated by election on 11-24-23.

SAISD—06-07-49—Los Angeles Heights ISD was annexed to SAISD by County Board action.

03-22-50—W. W. White CSD #015 and Hot Wells CSD #025 were annexed to SAISD by County Board action.

09-19-49—Fort Sam Houston ISD was annexed to SAISD by the State Board of Education.

03-08-52—Annexation of Fort Sam Houston ISD to SAISD was annulled, effective 07-01-52.

Harlandale was incorporated by election on 01-26-24.

Northside—

08-16-50—Leon Springs CSD #001, Helotes ESD #3½; Lock Hill CSD #005 and Leon Valley CSD 5½ were consolidated by election to form Northside RHSD #715 11-09-49—Mackey CSD #015 was consolidated to Northside by election to Northside Rural High School District.

06-13-55—Northside ISD #915 was created from Northside RHSD#715 by election.

South San (No information)

East Central—

03-15-49—Boldtville CSD #020, Sayers CSD #021, Utzville CSD #022.

Boerne—Incorporated by election on 02-28-07.

Comal County—Comal County Rural High School was created in 11-12-56.

Floresville—Floresville was created by Regular Session of the Thirty-Eighth Legislature, page 18 of the Special Laws, effective 02-07-23.

Medina Valley—Medina Valley ISD was formed on 12-10-59.

Schertz-Cibolo—formed by election on 03-07-40.

Boerne ISD—

02-28-07—Incorporated by election.

04-05-47—Upper Cibolo CSD #002 was consolidated with Boerne ISD by election.

07-05-49—Wasp Creek was divided between Sisterdale CSD #005 and Boerne ISD by action of the County Board.

08-31-49—Upper Balcones CSD #045 of Bexar County was consolidated with Boerne ISD by election.

04-10-50—Van Rawb CSD #013 of Bexar County was consolidated with Boerne ISD by election.

06-06-52—Kruezberg CSD #009 was divided between Kendalia RHSD #703 and Boerne ISD by action of the County Board.

08-07-52—A portion of Balcones CSD #001 and a portion of Pleasant Valley CSD #010 were annexed to Boerne ISD by action of the County Board.

08-26-52—A portion of Bulverde RHSD #702 of Comal County was annexed to Boerne by action of the County Board.

01-09-53—A portion of Pleasant Valley CSD #010 was annexed to Boerne by County Board action.

03-22-54—Balcones CSD #001 was consolidated with Boerne ISD by election.

04-08-54—Kendalia RHSD #703 was dissolved and the territory divided between Boerne ISD, Blanco ISD, of Blanco County, Comfort ISD of Kendall County and Sherwood RHSD of Comal County by action of County Board.

06-07-57—Pleasant Valley was consolidated with Boerne ISD by County Board action.

Comal County ISD—

11-12-56—Bulverde RHSD #702, Sherwood RHSD #703, Goodwin RHSD #704, Danville CSD #002, Mountain Valley CSD #003, Solms CSD #012, Davenport CSD #013, and Fischer CSD #014 were grouped to form Comal County Rural High School District #705 by action of County Board.

05-21-68—Comal County Rural High School was converted to Comal ISD by election.

Floresville—

07-17-48—Southerland Springs ISD was consolidated with Floresville ISD by election.

05-17-48—Midway CSD #044 was annexed to Floresville ISD by County Board action.

07-27-48—A portion of Floresville ISD was annexed to Stockdale ISD by action of County Board.

06-14-48—A portion of Stockdale ISD was annexed to Floresville by County Board action.

07-30-49—Sunnyside CSD #005, Wehmann CSD #030 and Camp Ranch were consolidated with Floresville by election.

01-09-50—Fairview CSD #001 and Labatt CSD #024 consolidated with Floresville ISD by election.

07-31-50—Ridout CSD #042 was consolidated with Floresville ISD by election.

08-04-50—A portion of Floresville ISD annexed to Poth ISD by County Board action.

07-28-54—Calaveras CSD #003 consolidated with Floresville ISD by election.

11-05-54—Picosa CSD #025 annexed to Floresville ISD by County Board action.

01-28-55—Canada Verdi CSD #006 annexed to Floresville ISD by County Board action.

02-25-55—Graytown CSD #054 annexed to Floresville ISD by County Board action.

02-25-55—A portion of Floresville ISD annexed to Poth ISD by County Board action.

04-03-57—Saspamco ISD annexed to Floresville ISD by County Board action.

Medina Valley ISD—

12-10-59—La Coste ISD and Castroville ISD were consolidated by election to form Medina Valley ISD.

Schertz-Cibolo ISD—

03-07-40—Cibolo CSD #029 was annexed to Schertz CSD #036 by election to form Schertz-Cibolo CSD #029.

03-07-55—Green Valley CSD #030 was annexed to Schertz-Cibolo by County Board action.

04-06-61—Schertz-Cibolo ISD from Schertz-Cibolo CSD #029 by election.

07-27-66—Clemens CSD #032 was divided between Marion ISD and Schertz-Cibolo ISD by County Board action on 07-27-66.

East Central—

Elemendorf CSD #023, Highland CSD #024, and Southton CSD #047 were consolidated by election to form East Central CSD #020.

11-14-49—Goebel CSD #031, China Grove CSD #019, Salatrillo CSD #031, and Hedwig CSD #039 annexed to East Central CSD #020 by election to form East Central RHSD #711.

09-30-66—East Central RHSD #711 converted to East Central ISD by election.

Judson—

06-25-58—Selma CSD #008, Converse CSD #012 and Kirby CSD #049 were grouped to form Judson RHSD #716 by County Board action.

12-16-66—Judson RHSD #716 incorporated for school purposes by election.

Somerset—

(No date)—Somerset CSD #006 Atascosa County was consolidated with Somerset ISD of Bexar County by election.

03-06-50—Oak Island CSD #034 was consolidated Somerset ISD by election.

XVIII. Do you agree that the educational needs of the students in the Edgewood Independent School District are no less than the educational needs of the other students going to free public schools in Bexar County, Texas?

ANSWER: We agree with the statement made in Interrogatory Number XVIII.

XIX. If you, or any of you, take the position that the educational needs of the children in Edgewood In-

dependent School District are less than the educational needs of the school children in the other public schools in Bexar County, Texas, please explain the basis of your answer.

ANSWER: No comment in view of agreement with Statement for Interrogatory Number XVIII.

XX. Do you take the position that costs of goods, materials, supplies, and construction substantially vary between Edgewood Independent School District and the other school districts in Bexar County, Texas?

ANSWER: We doubt that costs of goods, materials and supplies vary substantially between Edgewood Independent School District and the other school districts in Bexar County. Construction costs would be similar for the same type of school building with approximately the same equipment therein.

XXI. If any of you take the position that costs substantially vary in the answer above to Interrogatory Number XX, please expain the basis for such position.

ANSWER: No comment necessary.

XXII. Are the school district and boundaries of the Edgewood Independent School District a product of historical accident rather than any logical plan of development?

ANSWER: No valid information available on which to base a response.

XXIII. If your answer to the preceding Interrogatory Number XXII was "no", please explain the logical reasoning and basis for the present Edgewood Independent School District boundaries.

ANSWER: No comment necessary.

INFORMATION NOT AVAILABLE

Interrogatories I-XV deal with Alamo Heights, Edgewood, Harlandale, South San, SAISD, North East and Northside.

(b) Total market value of taxable property in each district at 100% valuation.

(c) Percentage of market value at which each district's property is assessed. Give both claimed percentage and State's estimate of actual percentage.

Interrogatory #2

(a) The number of people in each district

(c) The number of students in each district going to schools other than district schools.

Interrogatory #III

(a) The average per capita income in each district

(b) The average income of each wage earner in each district

(c) The average number of school-aged children per family in each district.

Interrogatory #IV

(b) The average number of teachers per school in each district.

(c) The student-teacher ratio per grade in each district.

(h) The percent of teachers with provisional certificates of education.

(i) The percent of teachers with permanent certificates of education.

(k) Any other credentials teachers in each school district have that would add to their qualifications.

(o) The salary expenditure for teachers per student.

(p) The turnover rate of teachers.

Interrogatory #V

(b) The number and percentage of drop-outs per year in each school district.

(c) The number of withdrawals per year in each district.

(g) The percentage of students in special education with the breakdown of the categories of special education.

(h) The percentage of first graders who speak only Spanish.

(j) The average class size.

(l) The numbers and grades in which drop-outs occur.

(m) The percentage of students from each school district that attend college.

(n) The percentage of students from each school district that graduate from college.

Interrogatory #VI

(a) The average age of the physical facilities in the district.

(b) The type of construction of the physical facilities in the district.

(c) The condition of the physical facilities in the district.

(d) The average number of students per class.

(e) The type of heating or air-conditioning system in the schools.

(f) The number of temporary structures.

(g) The land area that is used for school programs.

(h) The gymnasium space.

(i) The laboratory space.

(j) The number of substandard or dilapidated buildings.

Interrogatory #VII

(a) The background qualifications and educational qualifications of each principal.

(b) The number of vice-principals in each school and each district and their qualifications and backgrounds.

Interrogatory #VIII

(a) The grade school curriculum provided.

(b) The junior high school curriculum provided.

(c) The high school curriculum provided.

(d) A list of the schools that have split shifts or other unusual class hours.

(e) The number of students taking each course with a breakdown of:

1. percentage of Spanish surnames and/or Mexican Americans
2. percentage of Negro
3. percentage of Anglo

Interrogatory #IX

(a) As to library books:

1. The average age of each book
2. Any data you may have relating to the quality of each book

3. The number of book titles and the number of books, giving the number of students broken down into each school

4. The dollar amount spent on books

5. The dollar amount per student spent on books. The dollar amount spent on books, further broken down into the amount per student spent on books (Amounts by district)

(b) The number of registered nurses employed part-time by each district, broken down into the number of hours of work

(c) The availability of doctors for the students

(d) The availability of dentists for the students

(e) A description of any infirmary facilities provided

(h) Please list any other services available.

Interrogatory #XI

(a) A description of the laboratory equipment provided in each school

(b) The dollar value of the laboratory equipment provided in each school

(c) The dollar cost of supplies consumed in each school and a description of these supplies

(d) A description of the physical plant in which laboratory facilities are contained and the dollar value of such plant.

Interrogatory #XII

(a) What visual aid is provided in each school, its value, and average age

(b) What television equipment is provided in each school, its value, and average age.

(c) What recording equipment is provided in each school, its value, and average age.

(d) What computer equipment is provided in each school, its value, and average age.

(e) What other special equipment is provided in each school giving use, dollar value, and average age.

Interrogatory #XIII

(a) A description of the music facilities and activities in each school

(b) A description of the drama facilities and activities in each school

(c) A description of the art facilities and activities in each school

(d) A description of any other extra-curricular cultural or educational activities provided by each school.

Interrogatory #XIV

(a) The hours of extra-curricular activity as described in Interrogatory XIII above.

(b) The hours of classes in each school and a description of the split shifts or any other unusual class hours.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DEMETRIO P. RODRIGUEZ, ET AL

vs.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL

CIVIL ACTION NO. 68-175-SA

ANSWERS TO INTERROGATORIES

I. Please supply any information on the interrogatories formally propounded to you that were not answered at such time, but of which you have answers to at the present time.

ANSWER: No information is available to answer interrogatories not previously answered in the other set of interrogatories.

II. Please add any supplemental, new, or changed information relative to any of the interrogatories you answered heretofore in this cause, supplying information available to you since the time of answering said interrogatories.

ANSWER: The Texas Education Agency has attempted to bring up to date to the extent possible interrogatories previously answered. See attached memorandum from Jerry T. Barton addressed to Leon R. Graham and computer printout exhibits. All computer printout exhibits can be related to interrogatories of November, 1969. Procedure for identifying school districts by county district number of such printout exhibits was included in previous response to interrogatories. The appropriate numbers related to interrogatories dated November 12, 1969 and the respective supplemental, new, or changed information is as follows:

(Set 1—I. Series of interrogatories relating to school funds provided each school district)

(d) The tax rate of each district

1968-69
(Exhibit 1-a)

School District	Maintenance Bond (D-M)	Bond Rate (D-B)
Edgewood	.50	.90
North East	1.02	.48
Alamo Heights	1.25	.36
SAISD	1.25	.36
Harlandale	1.06	.41
Northside	.82	.68
South San	.90	.50

1969-70
(Exhibit 1-b)

School District	Maintenance Bond (D-M)	Bond Rate (D-B)
Edgewood	.55	.95
North East	1.10	.40
Alamo Heights	1.40	.35
SAISD	1.38	.36
Harlandale	.99	.48
Northside	.82	.68
South San	1.00	.50

PLAINTIFFS' EXHIBIT XII

(Set 1—I. Series of interrogatories relating to school funds provided each school district)

(e) Amount of tax income each district receives from its ad valorem taxes.

1968-69 (Exhibit 1-d)

School District	Maintenance Dollars (E-M)	Bond Dollars (E-B)
Edgewood	227,000	374,320
North East	3,976,222	1,870,736

Alamo Heights	1,514,762	435,996
SAISD	8,771,043	2,554,536
Harlandale	855,605	342,750
Northside	1,314,011	1,068,992
South San	457,825	254,410

1969-70 (Exhibit 1-e)

School District	Maintenance Dollars (E-M)	Bond Dollars (E-B)
Edgewood	324,643	549,253
North East	4,907,882	1,794,827
Alamo Heights	1,723,815	430,954
SAISD	10,004,017	2,627,763
Harlandale	1,014,751	489,693
Northside	1,603,485	1,328,233
South San	568,052	283,985

(f) Amount of funds received by each district under the Minimum Foundation Program.

1968-69 (Exhibit 1-d)

School District	Per Capita Dollars (F-PC)	Other Dollars in Minimum Foundation (MFP)
Edgewood	2,476,420	2,685,658
North East	2,785,421	3,327,263
Alamo Heights	606,409	573,338
SAISD	9,137,589	8,227,147
Harlandale	1,882,321	2,423,426
Northside	1,754,699	2,548,330
South San	802,664	1,008,218

1969-70 (Exhibit 1-e)

School District	Per Capita Dollars (F-PC)	Other Dollars in Minimum Foundation (MFP)
Edgewood	2,270,516	3,364,671
North East	2,864,870	4,335,225

Alamo Heights	557,176	749,957
SAISD	8,193,507	11,044,521
Harlandale	1,743,529	3,029,536
Northside	1,772,823	3,455,434
South San	775,733	1,394,449

(Set 1—I. Series of interrogatories relating to school funds provided each school district)

(g) Amount of funds received by each district from the State, not derived from either the Minimum Foundation Program or ad valorem taxes collected by the district.

1968-69 (Exhibit 1d)

School District	Other State Funds, i.e., supplemental salary and Incentive Aid (G)
Edgewood	19,675
North East	24,194
Alamo Heights	5,225
SAISD	70,725
Harlandale	15,619
Northside	—0—
South San	6,900

1969-70 (Exhibit 1-e)

School District	Other State Funds, i.e., supplemental salary and Incentive Aid (G)
Edgewood	61,558
North East	80,135
Alamo Heights	20,444
SAISD	141,925
Harlandale	49,956
Northside	24,150
South San	21,409

(h) Amount of funds received by each district from the federal government basis for such funds.

Amount of Funds Received from Federal Agencies
(Exhibits 2-e and f)

School District	1968-69	1969-70
Edgewood	1,885,277	2,757,153
North East	1,777,326	1,505,785
Alamo Heights	299,639	245,937
SAISD	3,991,851	6,681,104
Harlandale	1,155,237	970,762
Northside	1,003,317	2,211,268
South San	725,314	632,984

(i) Amount of funds received by each district from private sources and please state the sources.

Amount of Funds Received from Private Sources, i.e., gifts, etc.
(Exhibits 2-e and f)

School District	1968-69	1969-70
Edgewood	63,751	126,514
North East	812,926	643,590
Alamo Heights	296,238	245,511
SAISD	950,803	1,019,189
Harlandale	120,859	182,094
Northside	253,017	278,929
South San	105,289	111,832

(j) Amount of funds received by each district from other sources and please designate the sources.

(Set 1—I. Series of interrogatories relating to school funds provided each school district)

(j) Amount of funds received by each district from other sources

Amount of Funds Received from Other Sources; County Available, County Equalization, etc.
(Exhibits 2-e, f)

School District	1968-69	1969-70
Edgewood	205	217
North East	231	245
Alamo Heights	54	53
SAISD	809	608
Harlandale	164	165
Northside	137	154
South San	66	71

(k) Each school district's expenditure per pupil and please provide the formula used to arrive at such expenditure.

School Districts' Expenditures Per Pupil
(Exhibits 3-c, d)

School District	1968-69
Edgewood	332.48
North East	479.51
Alamo Heights	602.67
SAISD	456.23
Harlandale	383.38
Northside	415.89
South San	411.89

(m) Breakdown of each school district's expenditures in the following categories:

1. annual payment of bonded indebtedness
2. operation expenses
3. other expenses

1969-1970

School District	Annual Payments of Bonded Indebtedness	Operation Expenses	Other Expenses
Edgewood	477,980	8,283,082	955,397
North East	2,108,419	13,815,982	1,855,888

Alamo Heights	475,253	3,360,936	1,179,404
SAISD	2,636,186	34,607,492	923,961
Harlandale	512,973	7,017,538	1,099,207
Northside	1,309,458	8,303,925	3,365,867
South San	302,846	3,410,808	1,017,056

(Set 1—II. Series of interrogatories related to general population and school population in each district.

(d) A breakdown of the student population, showing the number of students in each grade.

Enrollment by Grade (1969-70)

District	1	2	3	4	5	6	7	8	9	10	11	12	Sp. Ed.
Edgewood	2471	2360	2201	2210	2241	2001	2310	1863	1631	1418	1159	1003	329
North East	1992	2251	2228	2349	2342	2313	2492	2376	2524	2613	2209	1969	302
Alamo Hts.	361	374	385	385	433	388	487	429	483	497	480	435	82
SAISD	7084	6900	6983	6690	6651	6472	6817	6427	6333	6638	5589	4902	1014
Harlandale	1613	1629	1570	1657	1590	1558	1577	1537	1499	1265	1012	872	444
Northside	1774	1900	1968	1826	1937	1805	1868	1735	1681	1299	1172	928	363
South San	913	919	948	903	830	808	708	672	625	535	380	266	186

Enrollment by Grade (1970-71)

Data not available.

(Set 1—IV. This series of interrogatories relates to teacher characteristics in each school district)

(a) Total number of teachers in each district.

Total Number of Teachers
(Exhibits 7-a, b, c, and d)

School District	1969-70	1970-71
Edgewood	874	876
North East	1,216	1,312
Alamo Heights	269	286
SAISD	2,875	3,025
Harlandale	693	736
Northside	794	909
South San	314	368

(d) The percent of teachers with college degrees

Percent of Teachers with College Degrees
(Exhibits 7-a, b, c, and d)

School District	1969-70	1970-71
Edgewood	81.57	90.41
North East	100.00	100.00
Alamo Heights	100.00	99.65
SAISD	99.40	99.50
Harlandale	97.83	99.18
Northside	99.74	99.77
South San	97.45	99.45

(Set 1—IV. This series of interrogatories relates to teacher characteristics in each school district.

(f) The percent of teachers with Masters Degrees.

School District	1969-1970	1970-1971
Edgewood	12.58	11.30
North East	23.93	26.52

Alamo Heights	36.80	34.61
SAISD	26.95	26.41
Harlandale	21.64	18.61
Northside	17.75	16.50
South San	12.73	10.05

(g) The percent of teachers with Doctorate Degrees

School District	1969-1970	1970-1971
Edgewood	.00	.00
North East	.00	.00
Alamo Heights	.37	.34
SAISD	.06	.03
Harlandale	.00	.00
Northside	.00	.00
South San	.00	.00

(o) The salary expenditure for teachers per student

Salary Expenditures for Teachers Per Student
(Exhibits 9-a, b, c, and d)

School District	1969-70
Edgewood	240.94
North East	324.97
Alamo Heights	414.47
SAISD	280.28
Harlandale	275.18
Northside	283.70
South San	254.98

(Set 1—V. This series of interrogatories relates to student characteristics.)

(i) The average daily class attendance in each district.

Average Daily Class Attendance
(Exhibits 9-a, b, c, and d)

School District	1969-70
Edgewood	92.96
North East	95.02
Alamo Heights	93.84
SAISD	90.58
Harlandale	92.18
Northside	94.20
South San	93.18

(Set 1—VII. This series of interrogatories relates to the administrative and advisory personnel in each district.)

(d) The Counselor-student ratio

Counselor-Student Ratio
(Exhibit 9-a, b, c, and d)

School District	1969-70
Edgewood	5,480
North East	1,077
Alamo Heights	1,254
SAISD	2,265
Harlandale	1,566
Northside	1,742
South San	1,626

Number and Percent of Anglo-American, Spanish Surname, and Negro Students in Each School and in Each District

(Exhibit 10)
(d), (e) and (f)

School District and Campus		No. of Anglo-American Students	%	No. of Negro Students	%	No. of Mexican-American Students	%	Total Number of Students
Edgewood	001	42	2.5	213	12.6	1,428	84.7	1,685
	002	125	6.0	74	3.5	1,889	90.3	2,092
	003	49	3.3	64	4.4	1,357	92.3	1,470
	041	38	6.4	29	4.9	530	88.8	597
	042	4	0.5	3	0.4	809	99.1	816
	043	9	1.0	3	0.3	893	98.7	905
	044	0	0.0	225	46.8	256	53.2	481
	045	18	1.8	9	0.9	998	97.3	1,026
	101	55	6.5	2	0.2	788	93.3	845
	102	0	0.0	2	0.3	622	99.7	624
	103	0	0.0	0	0.0	246	100.0	246
	104	15	1.9	2	0.2	789	97.9	806
	105	18	2.2	0	0.0	797	97.8	815
	106	15	1.5	4	0.4	951	98.0	970
	107	20	1.9	6	0.6	1,025	97.5	1,051
	108	2	0.2	12	1.1	1,074	98.7	1,088
	109	0	0.0	344	63.6	197	36.4	541
	110	12	1.4	11	1.3	830	97.3	853
	111	5	0.9	195	36.0	342	63.1	542
	112	18	1.4	2	0.2	1,266	98.4	1,286
	113	7	1.0	0	0.0	684	99.0	691
	114	29	2.7	9	0.8	1,041	96.5	1,079
	115	19	1.8	2	0.2	1,051	98.0	1,072
	116	327	44.6	189	25.7	215	29.3	734
	117	9	2.4	73	19.5	292	78.1	374
Edgewood District Totals		836	3.7	1,473	6.5	20,370	89.8	22,689

North East	001	2,265	88.0	0	0.0	299	11.6	2,574
	002	2,225	96.2	6	0.3	79	3.4	2,313
	003	2,238	97.2	0	0.0	63	2.7	2,303
	004	2,212	91.2	19	0.8	174	7.2	2,425
	041	1,363	95.6	0	0.0	58	4.1	1,426
	042	1,240	94.3	5	0.4	67	5.1	1,325
	043	996	87.0	13	1.1	128	11.2	1,145
	044	1,291	85.2	2	0.1	217	14.3	1,515
	045	754	91.0	8	1.0	64	7.7	829
	046	911	86.7	0	0.0	137	13.0	1,051
	101	297	90.0	3	0.9	30	9.1	330
	102	538	94.6	0	0.0	30	5.3	569
	103	505	88.9	0	0.0	61	10.7	568
	104	469	79.2	1	0.2	122	20.6	592
	105	569	86.5	2	0.3	73	11.1	658
	106	756	92.9	1	0.1	56	6.9	814
	107	450	90.9	2	0.4	36	7.3	495
	108	363	96.3	0	0.0	14	3.7	377
	109	316	95.8	0	0.0	10	3.0	330
	110	554	96.9	2	0.3	12	2.1	572
	111	528	80.9	0	0.0	125	19.1	653
	112	503	85.0	0	0.0	84	14.2	592
	113	514	86.5	0	0.0	80	13.5	594
	114	481	83.9	11	1.9	79	13.8	573
	115	493	77.2	0	0.0	144	22.5	639
	116	529	88.6	17	2.8	49	8.2	597
	117	457	97.2	2	0.4	9	1.9	470
	118	569	86.9	12	1.8	56	8.5	655
	119	444	79.9	1	0.2	111	20.0	556
	120	399	92.6	0	0.0	30	7.0	431
North East District Totals		25,229	90.2	107	0.4	2,497	8.9	27,961
Alamo Heights	001	1,162	87.1	8	0.4	224	12.1	1,850
	041	737	83.4	8	0.9	138	15.6	884
	101	755	94.4	7	0.9	35	4.4	800

	102	439	64.7	8	1.2	230	33.9	679
	103	284	48.9	0	0.0	297	51.1	581
	104	453	94.0	2	0.4	26	5.4	482
Alamo Heights Totals		4,280	81.1	33	0.6	950	18.0	5,276
SAISD	001	167	9.6	330	19.0	1,243	71.4	1,740
	002	291	14.3	12	0.6	1,737	85.1	2,041
	003	972	54.1	41	2.3	768	42.7	1,798
	004	19	1.0	455	22.9	1,510	76.1	1,985
	005	1,740	58.4	676	22.7	558	18.7	2,978
	006	996	44.9	988	44.5	218	9.8	2,218
	007	1,254	42.4	259	8.8	1,417	47.9	2,956
	008	68	3.0	5	0.2	2,167	96.7	2,240
	041	660	69.3	7	0.7	285	29.9	952
	042	13	1.3	0	0.0	971	98.7	984
	043	413	35.7	507	43.9	232	20.1	1,156
	046	9	1.1	663	77.5	184	21.5	856
	047	57	6.7	0	0.0	787	92.8	848
	048	121	18.6	150	23.1	371	57.1	650
	049	45	3.8	192	16.4	935	79.7	1,173
	050	592	50.5	3	0.3	570	48.6	1,173
	051	110	12.9	21	2.3	724	84.6	856
	052	234	22.5	83	8.0	717	68.9	1,040
	053	128	12.2	232	22.1	692	65.8	1,052
	054	61	8.8	309	44.7	321	46.5	691
	055	21	1.9	9	0.8	1,066	97.0	1,099
	056	232	21.9	731	69.2	87	8.2	1,057
	057	892	80.1	19	1.7	199	17.9	1,113
	058	256	28.4	51	5.7	589	65.4	901
	059	546	51.2	3	0.3	517	48.5	1,066
	061	17	1.3	11	0.9	1,246	97.8	1,274
	101	269	67.6	2	0.5	124	31.2	398
	102	42	11.3	10	2.7	316	84.7	373
	103	339	55.0	9	1.5	266	43.2	616
	104	8	1.3	0	0.0	621	98.7	629

105	308	74.4	2	0.5	98	23.7	414
106	82	15.6	10	1.9	432	82.3	525
107	43	8.8	10	2.1	431	88.5	487
108	23	3.0	20	2.6	713	94.3	756
110	12	0.9	13	1.0	1,277	98.1	1,302
111	6	0.6	3	0.3	949	99.1	958
112	23	3.8	0	0.0	579	95.9	604
113	56	7.7	163	22.5	505	69.8	724
114	38	17.3	160	72.7	22	10.0	220
115	10	1.3	4	0.5	757	98.2	771
116	72	8.2	0	0.0	808	91.7	881
117	115	23.6	3	0.6	367	75.2	488
118	33	3.2	1	0.1	992	96.6	1,027
121	7	1.0	0	0.0	695	99.0	702
122	0	0.0	272	70.5	114	29.5	386
123	52	11.0	10	2.1	412	86.9	474
124	207	47.2	17	3.9	215	49.0	439
125	454	75.7	12	2.0	132	22.0	600
126	197	48.5	0	0.0	209	51.5	406
127	9	0.9	978	96.2	30	2.9	1,017
128	29	17.9	3	1.9	130	80.2	162
129	122	11.1	2	0.2	970	88.6	1,095
130	13	1.7	338	45.4	393	52.8	744
131	50	18.1	0	0.0	227	81.9	277
132	13	3.7	186	52.7	154	43.6	353
134	524	67.8	14	1.8	233	30.1	773
135	142	23.5	55	9.1	400	66.3	603
136	47	5.5	0	0.0	802	94.5	849
137	501	71.2	92	13.1	108	15.3	704
138	4	0.9	7	1.6	415	97.4	426
139	126	18.9	0	0.0	539	81.1	665
140	14	2.1	0	0.0	659	97.3	677
141	54	33.1	17	10.4	92	56.4	163
142	19	3.7	0	0.0	501	96.3	520
143	128	22.0	6	1.0	447	76.9	581
144	57	5.5	8	0.8	967	93.4	1,035

	145	8	2.8	2	0.7	275	46.5	285
	146	106	55.2	22	11.5	63	32.8	192
	147	12	2.3	195	37.6	311	60.0	518
	148	220	35.0	2	0.3	402	63.9	629
	150	281	56.9	1	0.2	207	41.9	494
	151	28	19.4	6	4.2	110	76.4	144
	152	70	18.4	12	3.1	292	76.6	381
	153	2	0.3	629	90.1	67	9.6	698
	154	13	2.9	8	1.8	423	95.3	444
	155	223	47.5	2	0.4	242	51.6	469
	156	13	3.0	188	43.4	232	53.6	433
	157	23	2.3	40	4.1	919	93.6	982
	158	25	3.8	400	61.2	229	35.0	654
	159	120	57.7	14	6.7	72	34.6	208
	160	92	16.8	2	0.4	454	82.8	548
	161	201	23.5	64	7.5	587	68.5	857
	162	22	3.8	0	0.0	552	96.2	574
	164	798	82.3	9	0.9	161	16.6	970
	165	12	1.4	435	50.9	408	47.7	855
	167	209	54.9	3	0.8	169	44.4	381
	168	123	18.1	196	28.8	358	52.6	680
	169	40	3.8	4	0.4	1,013	95.8	1,057
	170	133	25.5	8	1.5	373	71.6	521
	171	0	0.0	418	97.4	11	2.6	429
	172	0	0.0	620	94.8	34	5.2	654
	173	297	53.1	170	30.4	87	15.6	559
	174	139	28.7	0	0.0	345	71.2	484
	175	127	21.7	1	0.2	457	78.0	586
	176	133	35.3	4	1.1	239	63.4	377
	177	27	7.4	208	57.3	128	63.4	372
	178	45	42.5	6	5.7	55	51.9	106
SAISD Totals		17,704	22.9	11,853	15.3	47,487	61.5	77,253
Harlandale	001	469	17.2	3	0.1	2,249	82.7	2,721
	002	1,300	66.1	0	0.0	667	33.9	1,967
	041	385	29.2	6	0.5	929	70.4	1,320

	042	40	3.0	5	0.4	1,306	96.7	1,351
	043	798	57.6	0	0.0	586	52.3	1,385
	044	365	57.5	0	0.0	270	42.5	635
	101	178	40.9	0	0.0	257	59.1	435
	102	478	66.1	3	0.4	240	33.2	723
	103	24	4.0	0	0.0	579	96.0	603
	104	28	3.0	3	0.3	897	96.6	929
	105	15	3.3	0	0.0	440	96.7	461
	106	124	16.2	0	0.0	640	83.8	764
	107	284	52.8	0	0.0	252	46.8	538
	108	351	45.3	0	0.0	424	54.7	775
	109	91	17.8	0	0.0	419	82.0	511
	110	173	28.6	0	0.0	432	71.4	605
	111	286	79.0	2	0.6	74	20.4	362
	112	10	1.8	1	0.2	541	98.0	552
	113	144	25.3	0	0.0	426	74.7	570
	114	262	43.8	16	2.7	320	53.5	598
	115	66	44.0	0	0.0	83	55.3	150
Harlandale Totals		5,871	32.7	39	0.2	12,037	67.0	17,955
Northside	001	1,113	74.3	28	1.9	344	23.0	1,497
	002	2,039	83.1	92	3.7	298	12.1	2,455
	003	1,579	92.2	5	0.3	123	7.2	1,712
	041	1,204	88.4	2	0.1	155	11.4	1,362
	042	834	80.6	40	3.9	145	14.0	1,035
	043	278	55.0	17	3.4	209	41.4	505
	044	681	74.2	50	5.4	104	17.9	918
	101	231	33.1	10	1.4	457	65.5	698
	102	595	79.3	33	4.4	117	15.6	750
	103	392	92.7	1	0.2	24	5.7	423
	104	295	79.3	2	0.5	73	19.6	372
	105	662	75.4	26	3.0	180	20.5	878
	106	622	78.7	50	6.3	103	13.0	790
	108	382	77.3	0	0.0	109	22.1	494
	109	322	78.3	0	0.0	89	21.7	411
	110	42	68.9	0	0.0	19	31.1	61

	111	388	72.0	0	0.0	148	27.5	539
	112	444	64.7	7	1.0	234	34.1	686
	113	475	85.3	6	1.1	72	12.9	557
	114	674	73.3	37	4.0	206	22.4	919
	115	589	84.7	0	0.0	99	14.2	695
	116	281	28.4	41	4.1	664	67.2	988
	117	652	78.6	48	5.8	120	15.2	829
	118	546	92.2	2	0.3	44	7.4	592
	119	521	95.1	0	0.0	27	4.9	548
	120	2	1.8	6	5.3	105	92.9	113
	121	22	42.3	10	19.2	20	38.5	52
	122	233	62.8	49	13.2	85	22.9	371
Northside Totals		16,098	75.8	562	2.6	4,439	20.9	21,250
South San	001	737	36.1	34	1.7	1,265	62.0	2,040
	041	553	36.8	38	2.5	906	60.4	1,501
	101	72	17.3	1	0.2	340	81.7	416
	103	136	22.1	2	0.3	476	77.5	614
	104	232	36.9	3	0.5	394	62.6	629
	105	61	6.1	3	0.3	938	93.6	1,002
	106	42	6.2	0	0.0	634	93.8	676
	107	97	16.6	19	3.3	467	80.1	583
	108	643	71.4	77	8.5	180	20.0	901
	109	316	87.5	23	6.4	20	5.5	361
	110	417	83.6	20	4.0	54	10.8	499
South San Totals		3,306	35.8	220	2.4	5,674	61.5	9,222

III. State the dropout rate for the districts sampled by the Governor's Committee on Public School Education, and which data is now in the control of the Texas Education Agency in the following manner:

(a) For the school district as a whole

(b) For the various ethnic groups in the school district

(c) By grade; and

(d) By grade for each ethnic group

ANSWER: The Governor's Committee on Public School Education promised its sample school districts that it would not reveal certain data such as dropout rates by individual school districts. The Texas Education Agency accepted this same responsibility as custodian of the Governor's Committee on Public School Education research files. The Texas Education Agency, therefore, will release no data on individual school districts except that which may be contained in the published reports of the Governor's Committee, copies of which have been made available to counsel for the Plaintiffs, unless ordered to do so directly by the Court.

IV. State the achievement score for the districts sampled by the Governor's Committee on Public School Education, and which data is now in the control of the Texas Education Agency in the following manner:

(a) Average high school senior test scores; and

(b) Average eighth grade test score.

ANSWER: The Governor's Committee on Public school Education promised its sample school districts that it would not reveal certain data such as dropout rates by individual school districts. The Texas Education Agency accepted this same responsibility as custodian of the Governor's Committee on Public School Education research files. The Texas Education Agency, therefore, will release no data on individual school districts except that which may be contained in the published reports of the Governor's Committee, copies of which have been made available to counsel for the Plaintiffs, unless ordered to do so directly by the Court.

XVI. Do you agree with the figures shown in said table?

ANSWER: We neither agree nor disagree with the figures in Exhibit A, as mentioned in interrogatory No. VX. We certainly would not question the ability or integrity of the staff of the Municipal Advisory Council of Texas. We consider the Council's work to be excellent in every respect. We simply do not know how the data were obtained. If such data were obtained from school district reports or questionnaires, our experience has been that some school districts simply do not know the exact market value of all taxable property in the district within a reasonable percentage of error. Without such exact data on market value there can be no valid comparison of assessed value for tax purposes to market value. Further, the Texas Education Agency has no valid data of its own to compare with the market value data in Exhibit A (Table 5).

AFFIDAVITS ATTACHED TO DEPOSITIONS OF BERKE, WEBB, CARDENAS, AVENA AND MORGAN.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DEMETRIO P. RODRIGUEZ, ET AL.,
Plaintiffs,

vs.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL.,
Defandants.

CIVIL ACTION NO. 68-175-SA

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

JOEL S. BERKE, being duly sworn, says:

I am the Director of the Educational Finance and Governance Program of the Policy Institute, Syracuse University Research Corporation, and Adjunct Professor of Political Science, Syracuse University.

The SURC Policy Institute is a not for profit research organization affiliated with but legally independent of Syracuse University. The research activities of the program I direct are closely interrelated with the research and teaching activities of the Maxwell Graduate School of Syracuse University, in particular with faculty and graduate students interested in the study of public finance as it bears upon American public education.

During the last two years, I have directed the following studies related to educational finance: first, a two year study supported by the Ford Foundation which

investigated the patterns of allocation of federal aid to education and the decision-making patterns which underlay those decisions in Washington, D. C. and in six states, of which Texas was one. A number of articles, monographs, and a forthcoming book have resulted from that research, *Federal Aid to Public Education: Who Benefits?* (a committee print of the United States Senate Committee on Equal Educational Opportunity, of which I am the principal author, is attached as Appendix A). Second, for the New York State Commission on the Quality Cost, and Financing of Education, I served as co-director of a study intended to evaluate New York's school finance program, devise alternatives, and through computer simulation demonstrate the financial impact of new aid formulas and distribution mechanisms. The report of that study is currently under consideration by two interested publishers. Third, I am executive director of a study for the United States President's Commission on School Finance intended to improve information available relating to educational finance. Fourth, I am at present a Guest Scholar at the Brookings Institution in Washington, D. C. under a grant from the Ford Foundation designed to permit me to conduct research and complete a manuscript on the political and economic aspects of equal educational opportunity. Fifth, I am co-author of a study for the United States Senate, Committee on Equal Educational Opportunity titled "Financial Aspects of Equality of Educational Opportunity".

In the conduct of this study of Texas school finance I have had the valuable assistance of a number of highly qualified colleagues. Most integrally involved in the conduct of the study which is the subject of this affidavit were Anthony Carnevale and Daniel Martin, candidates for the Ph.D. degree at Syracuse University. Professor Seymour Sacks, one of the nation's

leading scholars of the economics of education, gave invaluable advice and guidance at numerous points over the last few months and has served as principal consultant on several of the projects mentioned above which had direct relevance to this study of Texas school finance. Ronald D. White of the Policy Institute staff and Barrie L. Goldstein, now a student at George Washington University School of Law, provided assistance in the conduct of the research, as did Professor Robert Firestine of the University of Florida Urban Studies Program. While my debt to these individuals and to the organizational assistance of the Policy institute cannot be overstated, I am fully responsible for the contents of the materials prepared for this affidavit.

INTRODUCTION AND SUMMARY

This affidavit has been prepared as a result of a study of school finance in the State of Texas directed by researchers who have spent the last two years in the analysis of the official financial records of the Texas State Education Department and the Governor's Committee on Public School Education[1]. On the basis of that analysis we conclude that the system of school finance in Texas makes the quality of education a direct function of the wealth of local school districts, providing consistently higher quality schooling in districts with higher property values per pupil and consistently lower quality education in school systems with less local resources available for taxation. Furthermore, our study demonstrates that the poorer districts tax themselves at consistently higher equalized tax rates yet realize far lower tax yields than is true in the richer districts.

[1]For a description of the procedures and methodology used in this study, please see Appendix B.

Discrimination against the poor is not limited to poverty as measured by property valuation: school districts with lower median family incomes are disadvantaged in regard to the quality of school services. School systems with the highest average income have the highest school expenditures; districts with the lowest average incomes have the lowest school expenditures.

Racial discrimination is also readily apparent in Texas educational finance. There is a consistent pattern of higher quality education in districts with higher proportions of Anglo-Americans, and lower quality education in districts with lower proportions of Anglos. In short, the more Negroes and Mexican-Americans in the school population of a district, the lower its revenues for education.

The effects of these financial patterns have direct impact on the quality of education offered to Texas school children. Both the average salary levels, which are reflective of the quality of teachers, and the number of professional personnel per pupil vary directly and markedly with the revenues available per pupil. Thus, in general, the higher the revenues for the schools, the higher the quality of education in the district.

Our study also shows that responsibility for bringing about this invidious pattern of educational resource allocation rests squarely with the state for two reasons. First, the creation by the state of local districts with unequal taxable resources plays the primary part in establishing a system biased in favor of richer districts. Second, by adopting a state aid system that is insufficiently equalizing to offset the disparities among districts, discrimination against the poor in the provision of school services is assured. In the eyes of the experts who participated in our study a system more effectively designed to assure inequality of edu-

cational opportunity would be difficult to design. Yet as the data which follows will indicate, just such a system currently exists in the State of Texas as a whole and in Bexar County in particular.

DISTRICT WEALTH, INCOME, RACE AND SCHOOL REVENUES

The basic measure of district wealth employed in this study is the value of equalized taxable property[1] per pupil in average daily attendance. While from an economic standpoint there are questions as to whether property value is itself an appropriate criteria of a community's ability to raise revenue, we employ that basic measure because property taxation provides virtually all locally raised revenues for education. In addition, as Table I (see page 6) indicates, there is a rough but important correlation between relative levels of property value and relative levels of average income in school districts: districts high in property value per pupil are high in average income; those that are moderate in property value are moderate in income level, and those low in property valuation are also low in income.

District Wealth and School Revenue

For purposes of analysis, we have grouped the 110 districts into categories of descending amounts of equalized property per pupil, or in other words, descending order of community wealth. If we compare the average state and local revenues per pupil as shown on Table I (see page 6) with those district wealth categories, a clear and consistent relationship emerges: the richer the district, the higher the revenues available for each pupil's education. Graph I (see page 7) demonstrates the relationship visually, and shows how very

[1]See Appendix C for an explanation of "equalized taxable property".

direct and regular it is. Note also the extreme range in both wealth and expenditure categories, from well over $100,000 to well below $10,000 in valuation, and from $815 to $305 in expenditures, ratios approaching 20:1 in property value and 2:1 in expenditures. The expenditure range in our sample is an average, and is therefore a particularly compelling statistic, indicating that a regular pattern exists in which children in poor communities consistently receive an education two and one half times less costly than children who live in wealthier places. (For the state as a whole, the ratio of the highest expenditure district to the lowest is $5,334 to $264 or 20:1.)

TABLE I

THE RELATIONSHIP BETWEEN DISTRICT WEALTH, INCOME, RACE, AND SCHOOL REVENUES

TEXAS SCHOOL DISTRICTS

Categorized by Equalized Property Values, Median Family Income, and State-Local Revenue

Market Value of Taxable Property Per Pupil[1]	Median Family Income From 1960[2]	Per Cent Minority Pupils[3]	State & Local Revenues Per Pupil[4]
Above $100,000 (10 Districts)	$5,900	8%	$815
$100,000-$50,000 (26 Districts)	$4,425	32%	$544

[1]Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

[2]1960 U.S. Census data. 1970 Census data on income levels is not yet available from the U.S. Department of Commerce; however, when it is available, it can readily be supplied to the Court. The projected availability date is late 1971 or early 1972.

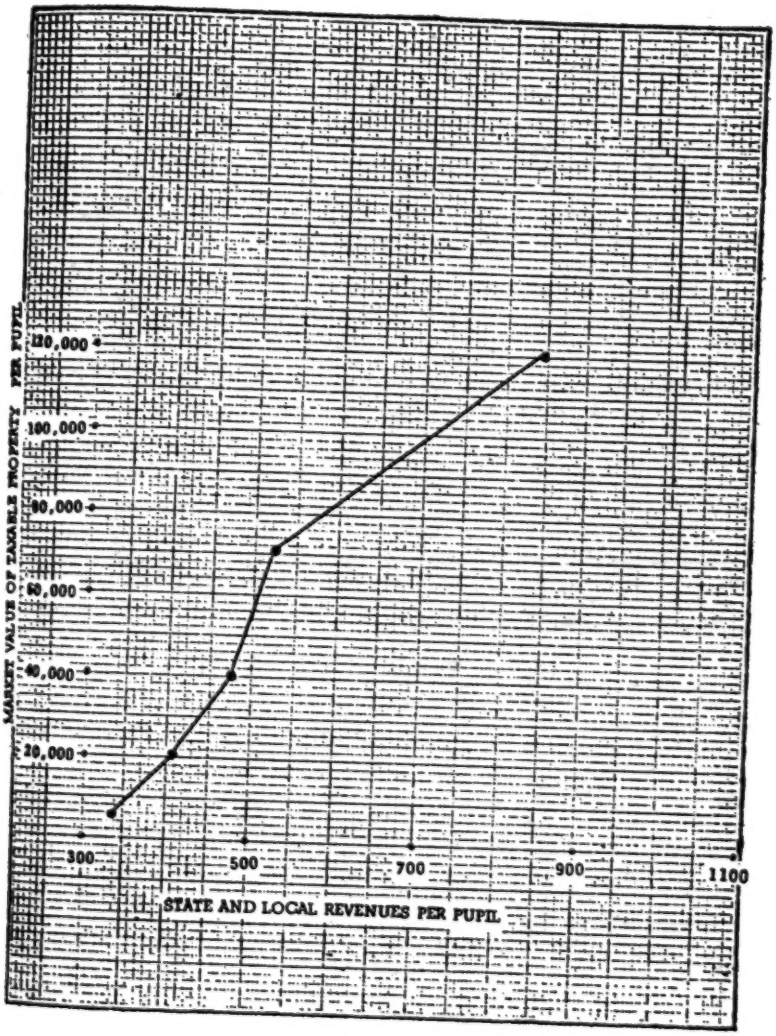
[3]Directory of Public Elementary and Secondary Schools in Selected Districts, Office of Education, HEW.

[4]Op. Cit., SURC.

GRAPH I

THE RELATIONSHIP BETWEEN DISTRICT WEALTH

AND STATE-LOCAL REVENUES*



*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

$50,000-$30,000 (30 Districts)	$4,900	23%	$483
$30,000-$10,000 (40 Districts)	$5,050	31%	$462
Below $10,000 (4 Districts)	$3,325	79%	$305

Median Family Income and School Revenue

The relationship between income and revenues is also an important one. It shows that it is not simply governmental or jurisdictional poverty that is inversely correlated with school quality, but personal poverty as well. Table I (page 6) indicates that districts in the highest category of income ($5,900) receive the most costly education and, those in the lowest income category ($3,325) receive the least expensive school services. While the relationship near the average are somewhat mixed, they do not work against the prevailing pattern because the range (only $600 in income) is too small to be meaningful. In short, as Graph II (page 9) demonstrates, the directness of the association between income and school quality is clear.

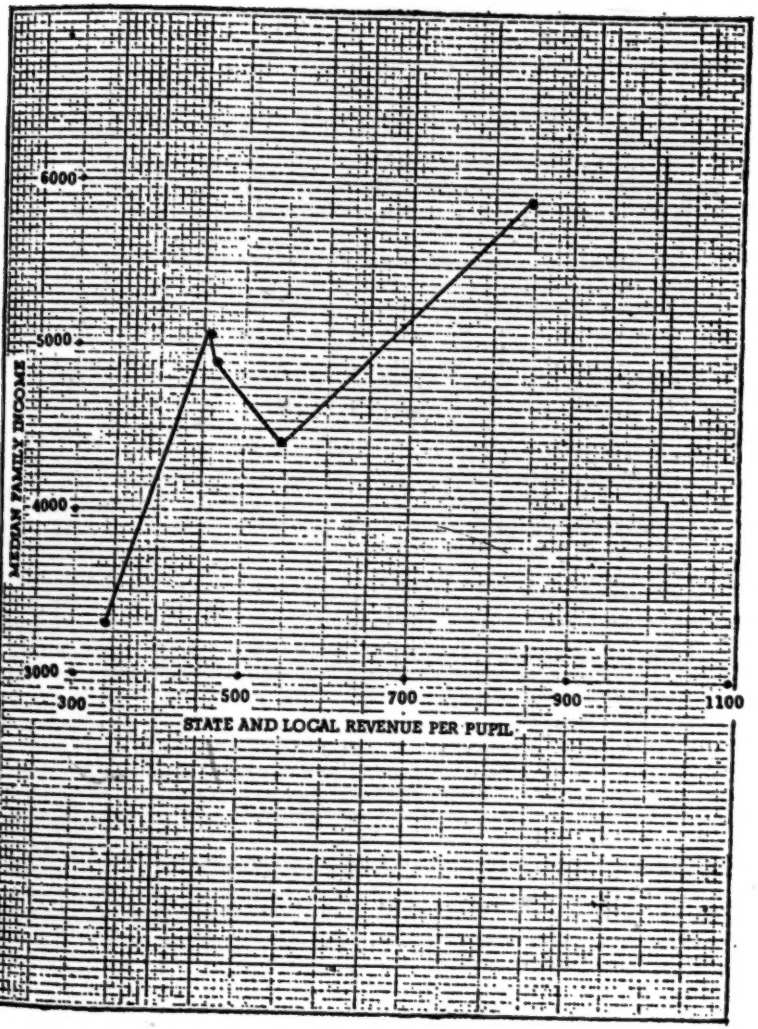
Race and School Revenue

The correlation between the proportion of Mexican-Americans and Negroes in the schools and the quality of school services is precisely the reverse of the income-school services relationship. That is, the lower the proportion of Mexican-Americans and Negroes, the higher the school expenditures; the higher the proportion of minority group enrollment, the lower the resources devoted to education. Again, as in the income relationship, the Table I (page 6) and Graph III (page 12) show some small inconsistency in the three middle categories, but the direction of the numbers and of the line on the graph tell an eloquent and vivid story of denial of equal educational opportunity.

GRAPH II

THE RELATIONSHIP BETWEEN MEDIAN FAMILY INCOME

AND STATE-LOCAL REVENUES*



*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

A similar relationship was found between the percentage of Mexican-American pupils and school expenditures in a study conducted by the U. S. Commission on Civil Rights (see Chart I, page 11). Their examination of Texas school systems with at least 10% Mexican-American enrollment showed that with a minor anomaly in the category of districts with the lowest proportion of Mexican-Americans, school expenditures declined as the proportion of Mexican-Americans increased.

DISTRICT WEALTH AND TAX EFFORT

One of the cruel ironies in the current approach to supporting schools in Texas is that the communities which have the least money for their schools are the very districts which tax themselves most heavily to raise school revenues. Using equalized tax rates which permit comparisons among districts, Table II (page 13) shows an unbroken and consistent inverse relationship between equalized district wealth and effort. The richer a district is, the less severely it need tax itself—and as the third column on the table shows—the more it realizes in locally raised revenues. In short, as tax rates increase the amount realized decreases.

DISTRICT WEALTH AND HIGHEST TAX EFFORT AND YIELD

Table III (page 16) takes the relationship between district wealth and tax effort a step further. The table assumes a similar tax effort—effort made by the district with the highest tax rate in the sample—throughout all districts, and examines the resultant differences in yield. The table clearly shows that increased tax effort only magnifies the differences in possible return between wealthier and poorer districts.

CHART I

EXPENDITURES PER PUPIL IN ADA IN TEXAS

Districts 10 per cent or more Mexican-American with total enrollment 300 pupils or more*

(Expenditures are from State and local revenue only.)

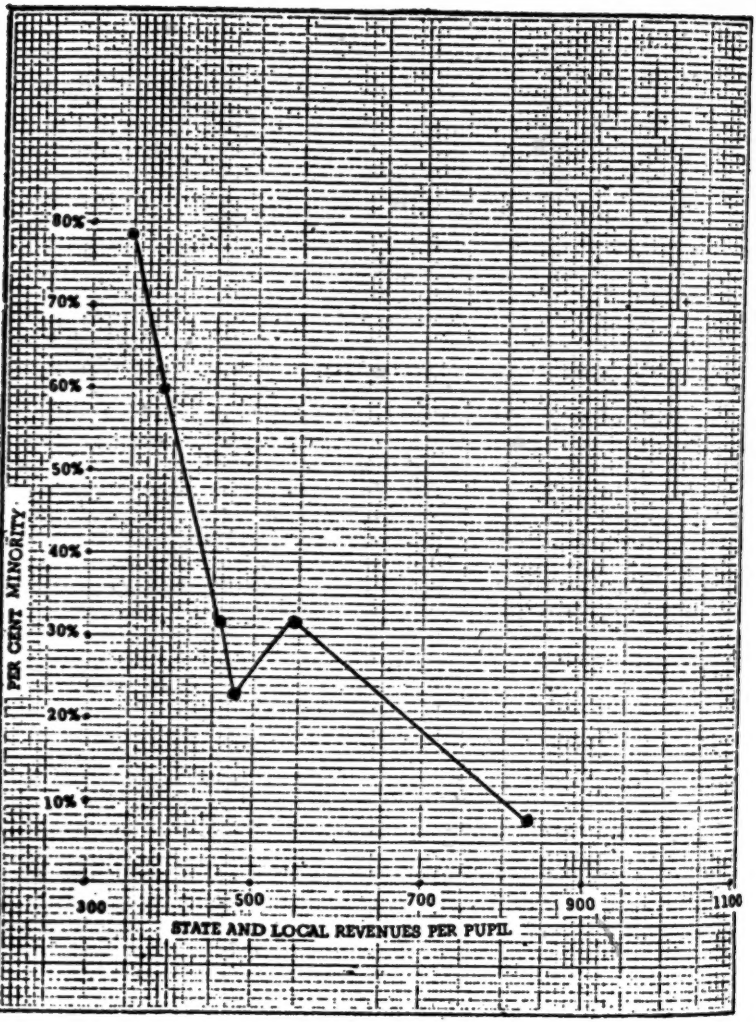
Percent Mexican-American of District Enrollment	DISTRICTS IN SAMPLE		ESTIMATES FOR ALL DISTRICTS	
	Number of Districts	Per Pupil Expenditures	Number of Districts	Per Pupil Expenditures
10-19.9	55	$457	85	$444
20-29.9	38	484	59	477
30-49.9	32	444	49	444
50-79.9	39	377	60	382
80-100	23	292	30	297

* Source: U. S. Commission on Civil Rights study encompassing a random sample of districts in Texas. For the raw data, upon which the study was based, see Appendix D. For an explanation of the sampling techniques utilized for the Commission study, see United States Commission on Civil Rights, *Mexican-American Education Study, Report I: Ethnic: Isolation in the Public Schools of the Southwest,* p. 7-8 (1971). A copy of the report is attached as Appendix E.

GRAPH III

THE RELATIONSHIP BETWEEN PER CENT MINORITY

AND STATE-LOCAL REVENUES*



* Source: Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

TABLE II

THE RELATIONSHIP OF DISTRICT WEALTH TO TAX EFFORT AND TAX YIELD*

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES, EQUALIZED TAX RATES**, AND YIELD OF RATES

CATEGORIES Market Value of Taxable Property Per Pupil	EQUALIZED TAX RATES ON $100	YIELD PER PUPIL (Equalized Rate Applied to District Market Value)
Above $100,000 (10 Districts)	$ .31	$585
$100,000-$50,000 (26 Districts)	.38	262
$50,000-$30,000 (30 Districts)	.55	213
$30,000-$10,000 (40 Districts)	.72	162
Below $10,000 (4 Districts)	.70	60

Table IV (page 17) concludes our analysis of the relationship between wealth and effort. It points up that increased effort is not only a futile exercise, as is apparent in Table III (page 16), but that the resulting burden increases at a much greater rate for poorer districts than for richer if they both seek to realize the highest return in our sample.

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND STATE AND FEDERAL AID

Given these disparities in local revenue raising ability, how effectively is the Texas equalization aid system

*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

**See Appendix C for an explanation of the equalized tax rate.

working? The answer may be found in Table V (page 18). While there appears to be a mild equalizing direction in the state aid system, its equalizing effect fails to operate in favor of the poorest districts. In other words, wealthier districts receive less aid than poorer ones in four of the five wealth categories, but the system provides more aid to the three categories clustered around the average than it does to the poorest class of school districts.

Possibly more important than its failure to aid adequately the neediest districts is the mildness of its equalizing tendencies. In a state where state aid provides more money for education than do local revenues, steeply equalizing financial program could redress the imbalances among districts in local revenue capacity. In Texas that does not happen. State aid provides only $52 more to the second richest category than to the highest despite a local revenue gap of over $320. Between the next two categories state aid provides virtually no equalization despite a local gap of more than $60. As local revenue falls off most steeply, state aid, as already noted, fails to equalize.

TABLE III

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND HIGHEST TAX EFFORT*

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUE AND YIELD GENERATED IF HIGHEST TAX RATE IS APPLIED TO ALL DISTRICTS

CATEGORIES Market Value of Taxable Property Per Pupil	Hypothetical Yield of Highest Tax Rate Per Pupil
Above $100,000 (10 Districts)	$2,356

* Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

$100,000-$50,000 (26 Districts)	918
$50,000-$30,000 (30 Districts)	519
$30,000-$10,000 (40 Districts)	292
Below $10,000 (4 Districts)	108

TABLE IV

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND HIGHEST TAX EFFORT*

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUE AND TAX RATE REQUIRED TO GENERATE HIGHEST YIELD IN ALL DISTRICTS

CATEGORIES Market Value of Taxable Property Per Pupil	Tax Rate Needed to Equal Highest Yield
Above $100,000 (10 Districts)	$ .64 per $100
$100,000-$50,000 (26 Districts)	1.49 per $100
$50,000-$30,000 (30 Districts)	2.58 per $100
$30,000-$10,000 (40 Districts)	4.88 per $100
Below $10,000 (4 Districts)	12.83 per $100

* Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

TABLE V

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND SCHOOL REVENUES

REVENUES OF TEXAS SCHOOL DISTRICTS* CATEGORIZED BY EQUALIZED PROPERTY VALUES AND SOURCE OF OF FUNDS

CATEGORIES Market Value of Taxable Property Per Pupil	Local Revenues Per Pupil	State Revenues Per Pupil	State & Local Revenues Per Pupil (Columns 1 and 2)	Federal Revenues Per Pupil	Total Revenues Per Pupil (State-Local-Federal, Columns 1, 2 and 4)
Above $100,000 (10 Districts)	$610	$205	$815	$ 41	$856
$100,000-$50,000 (26 Districts)	287	257	544	66	610
$50,000-$30,000 (30 Districts)	224	260	484	45	529
$30,000-$10,000 (40 Districts)	166	295	461	85	546
Below $10,000 (4 Districts)	63	243	305	135	441

* Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

State action, then, has created a system of financing the public schools of Texas that is characterized by marked disparities in educational expenditures. Those disparities have arisen because the state has created local districts with unequal sources of revenue and then has adopted a state aid system that fails to overcome those inequities. Federal aid, on the other hand, indicates how an equalizing system can operate. Although the amounts of federal aid are too small to compensate for the disparities that arise from state action, with the exception of the middle category of districts in Table V (page 17) federal aid flows in greater magnitudes to poorer school systems.

THE RELATIONSHIP OF DISTRICT WEALTH TO EDUCATIONAL QUALITY

In the preceding discussion we have demonstrated the inequities and disparities that characterize school support in Texas. That analysis has been conducted in terms of revenues, tax rates, equalized property value and the like. But what is most pressing about the problems we have uncovered is that they have a direct and ascertainable impact on the quality of education afforded youngsters by the State of Texas. While a variety of indicators might be used, we have selected two as examples of the differences in educational quality that exist among school districts.

The first indicator is related to the quality of professional personnel (teachers, guidance counselors, administrators, etc.) in the district. It takes the average cost per pupil for professional personnel, thus subsuming a number of factors including professional training, length of tenure, pupil teacher ratio, and other less tangible factors. While in individual cases no one would argue that a particular higher salaried professional is more skilled or valuable than one earning

slightly less, in aggregate terms and over large numbers of individuals, research suggests that the more a system pays for its staff in comparison with other districts, the better the quality of its personnel. Table VI (page 20) and Graph V (page 21) show the relationship. Without exception, the wealthier the district the higher the professional cost per pupil.

The second indicator of quality tells virtually the same story. When the ratio of professional personnel to pupils is examined, with the slight exception that the bottom two categories exchange places, the richer the district, the higher the ratio of teachers per 100 pupils. (See Table VI (page 20) and Graph VI (page 22).)

In short, higher revenues for education are important because they purchase higher quality education. As we have shown, richer districts not only have the higher revenues but do spend them for more and higher quality teachers, administrators, and guidance counselors.

BEXAR COUNTY

Besides examing Texas school finance through the representative sample of 110 school districts, we have also studied a subsample composed of the six districts in Bexar County which happened to be a part of our larger sample. For a few criteria, we have been able to locate reliable data, and in those instances we have shown relationships for the entire county. In either situation, the six or the twelve district Bexar County subsample, patterns emerge almost as clearly as they have for the statewide study. However, exceptions and anomalies crop up due to the small number of districts within Bexar county. Yet despite some statistical muddiness, when we conducted an analysis that was paral-

lel to that conducted on the 110 district sample, the conclusions we reached were essentially identical with those we find in the larger study.

TABLE VI

THE RELATIONSHIP OF DISTRICT WEALTH TO EDUCATIONAL QUALITY*

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUATION, AND SELECTED INDICATORS OF SCHOOL QUALITY

CATEGORIES Market Value of Taxable Property Per Pupil	Professional Salaries Per Pupil	Professional Personnel Per 100 Pupils
Above $100,000 (10 Districts)	413.12	5.57
$100,000-$50,000 (26 Districts)	359.72	5.17
$50,000-$30,000 (30 Districts)	327.66	4.84
$30,000-$10,000 (40 Districts)	290.16	4.37
Below $10,000 (4 Districts)	276.65	4.54

DISTRICT WEALTH, INCOME, RACE AND STATE-LOCAL REVENUE

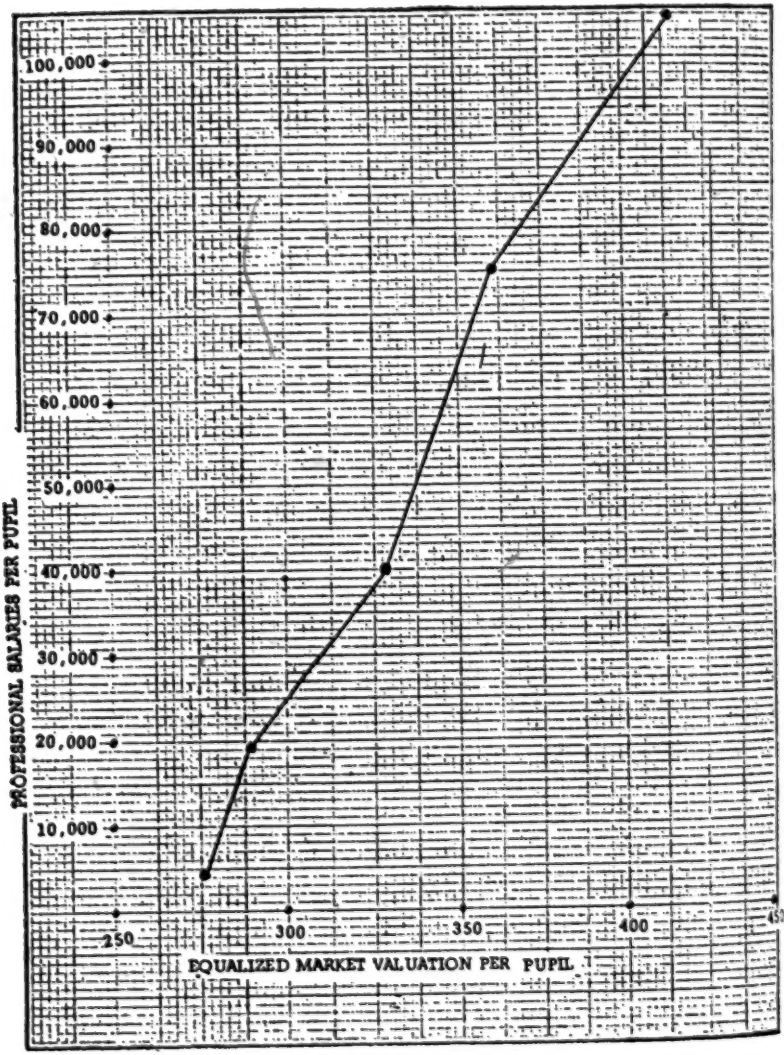
The relationship of district wealth, income, race, and school expenditures in Bexar County holds no surprise to readers of this study. As district wealth as measured by property value declines, so do per pupil expenditures from state and local revenues. Again, as in the state as a whole, we find a wide range of variations, nearly 10:1 in property values, and better than 2:1 in

* Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

GRAPH V

RELATIONSHIP BETWEEN PROFESSIONAL SALARIES

PER PUPIL AND EQUALIZED VALUATION PER PUPIL *

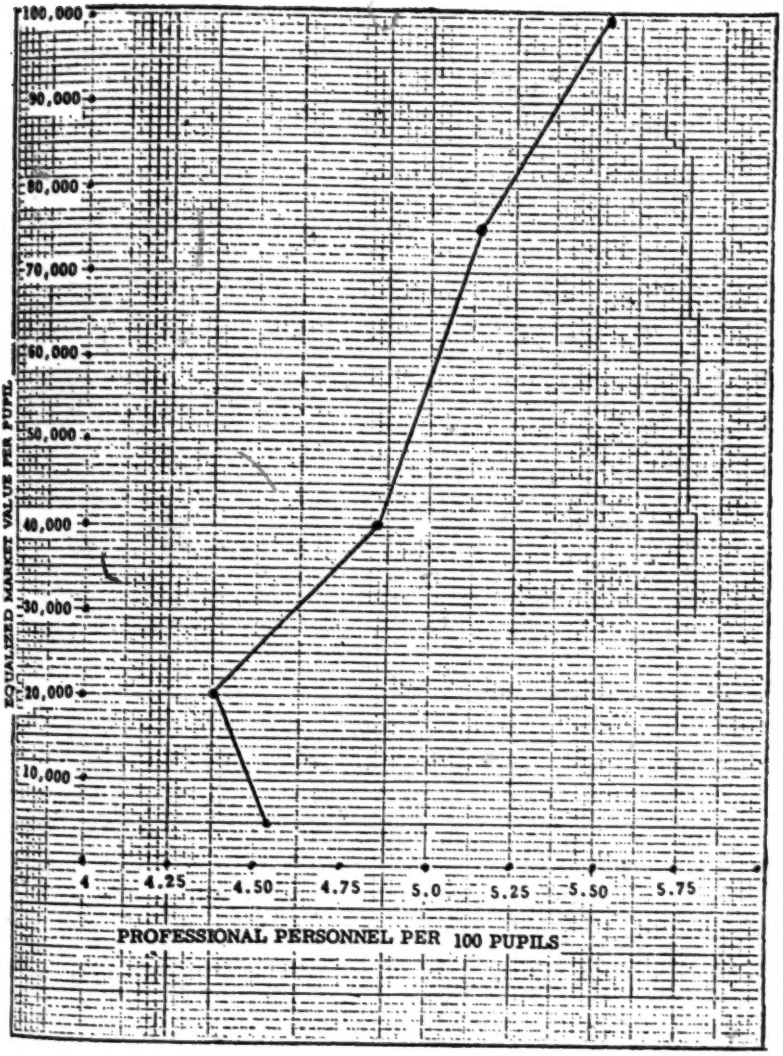


*Source: Policy Institute, Syracuse University Research Corporation, Syracuse New York.

GRAPH VI

THE RELATIONSHIP OF PROFESSIONAL PERSONNEL TO

EQUALIZED MARKET VALUE PER PUPIL .*



*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

expenditures. While these variations are somewhat smaller than those we found in the state 110 district sample, the fact that variations of that magnitude exist within a single county is remarkable. For the districts on the short end of those discrepancies, the effects are particularly difficult, since they are often in direct competition with their more favored neighbors for personnel and other school resources.

Income variations are both wide and strongly correlated with school expenditures. Table VII (page 25) shows the familiar Texas pattern: more affluent districts provide consistently more expensive school services. Similarly the relationship between race and revenues is as readily apparent in Bexar County as it is in Texas generally. While, as noted above, there are more anomalies in the middle range of wealth in this small sample than we found in the larger, the nature of small, nonrepresentative samples would suggest no other outcome.

DISTRICT WEALTH AND TAX EFFORT

Perhaps the greatest deviation from statewide patterns appears in tax effort. Although the phenomenon of poorer districts exerting higher tax effort yet realizing lower yields, does not emerge as a consistent pattern, (see Table VIII, page 26), it is clear that at best only a minor part of low spending in poorer districts, like Edgewood, can be attributed to a lower level of effort than some of their more fortunate Bexar County neighbors.

District Wealth and Highest Tax Effort and Yield

Employing the same analytical technique as we did for the larger sample, however, we find that even if the poorer districts were to expend tax effort equal to the highest effort of any district in the county, the resultant differences in yield would consistently favor the

wealthy. Thus, in order to realize a yield equal to the highest district in the county, poorer districts would have to expend consistently greater effort than would those with higher property valuation per pupil. This phenomenon is demonstrated in Table IX (see page 27).

RELATIONSHIP OF DISTRICT WEALTH TO STATE AND FEDERAL AID

When we examine the relationships among different sources of funding in Table X (see page 29) a crucial effect emerges once again. State aid is unable to offset inequities in relative capacities to finance education that grow out of differences in local taxable resources. Ranging from $225 for Alamo Heights, the wealthiest district, to $250 in Harlandale, the next to the poorest (whose property value per pupil is but one fifth of that in the wealthiest) is about as mild a pattern of equalization as one could devise. When the fact that Edgewood with less than one twelfth the valuation per pupil of Alamo Heights gets only $3.00 more in state aid, it would appear that there is no meaningful equalization through state resources in Bexar County.

TABLE VII

RELATIONSHIP BETWEEN DISTRICT WEALTH INCOME, RACE, AND STATE-LOCAL REVENUE

SELECTED BEXAR COUNTY SCHOOL DISTRICTS RANKED BY MARKET VALUATION MEDIAN FAMILY INCOME, PROPORTION OF MINORITY PUPILS, AND STATE-LOCAL REVENUE

School Districts Ranked from High to Low by Market Value Per Pupil[1]	Median Family Income from 1960 Census[2]	Per Cent Minority Pupils[3]	State-Local Revenue Per Pupil[4]
ALAMO HEIGHTS (49,478 Market Value Per Pupil)	$8,184	14%	$558
NORTH EAST (28,202 Market Value Per Pupil)	$5,900	7%	$415
SAN ANTONIO (21,944 Market Value Per Pupil)	$4,691	72%	$353
NORTH SIDE (20,794 Market Value Per Pupil)	$4,600	18%	$362
HARLANDALE (11,345 Market Value Per Pupil)	$4,436	62%	$323
EDGEWOOD (5,960 Market Value Per Pupil)	$3,405	75%	$248

[1]Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

[2]*Ibid.*

[3]Director of Public Elementary and Secondary Schools in Selected Districts, O.E., HEW.

[4]*Op. cit.*, Syracuse University Research Corporation.

TABLE VIII

THE RELATIONSHIP OF DISTRICT WEALTH TO TAX EFFORT AND TAX YIELD

BEXAR COUNTY SCHOOL DISTRICTS RANKED BY PROPERTY VALUES, EQUALIZED TAX RATES, AND YIELD OF RATES

Districts Ranked High to Low by Market Valuation Per Pupil	Equalized Tax Rates on $100[1]	Yield Per Pupil Equalized Rate Applied to District Market Value)[2]
ALAMO HEIGHTS	$ .68	$343.00
JUDSON	.27	106.00
EAST CENTRAL	.35	109.65
NORTH EAST	.56	173.46
SOMERSET	.33	87.61
SAN ANTONIO	.62	136.05
NORTH SIDE	.52	108.13
SOUTH WEST	.27	60.19
SOUTH SIDE	.39	64.61
HARLANDALE	.51	59.13
SOUTH SAN ANTONIO	.61	101.73
EDGEWOOD	.42	26.28

[1]Computed from Market Valuations and Assessed Valuation in *The Governors Committee on Public Education: The Challenge and the Chance*, 1968 and Actual Tax Rates from the *Public School Directory*, Texas Education Agency, 1967-68.

[2]Computed from *op. cit.*, the *Governors Committee on Public Education: The Challenge and the Chance*, 1968, and *op. cit.*, SURC Data.

TABLE IX

RELATIONSHIP BETWEEN DISTRICT WEALTH AND HIGHEST TAX EFFORT

BEXAR COUNTY DISTRICTS RANKED BY EQUALIZED PROPERTY VALUE AND TAX RATE REQUIRED TO GENERATE HIGHEST YIELD IN ALL DISTRICTS

Districts Ranked from High to Low Market Valuation Per Pupil	Tax Rate Per $100 Needed to Equal Highest Yield[1]
ALAMO HEIGHTS	$ .68
JUDSON	1.04
EAST CENTRAL	1.17
NORTH EAST	1.21
SOMERSET	1.32
SAN ANTONIO	1.56
NORTH SIDE	1.65
SOUTH WEST	2.10
SOUTH SIDE	3.03
HARLANDALE	3.20
SOUTH SAN ANTONIO	5.77
EDGEWOOD	5.76

Indeed, what equalization there is among school districts in the area is a function of federal aid, with Edgewood receiving better than three times the allotment of Alamo Heights. Greater amounts of federal aid are virtually perfectly aligned with increasing poverty in the County.

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[1]Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

TABLE X

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND SCHOOL REVENUES

REVENUES OF SELECTED BEXAR COUNTY SCHOOL DISTRICTS RANKED BY PROPERTY VALUES AND SOURCE OF FUNDS

Selected Districts From High to Low By Market Valuation Per Pupil	Local Revenues Per Pupil[1]	State Revenues Per Pupil[2]	State & Local Revenues Per Pupil[3]	Federal Revenues Per Pupil[4]	Total Revenues Per Pupil (State-Local-Federal)[5]
Alamo Heights	$333	$225	$558	$ 36	$594
North East	182	233	415	53	468
San Antonio	134	219	353	69	422
North Side	114	248	362	81	443
Harlandale	73	250	323	71	394
Edgewood	26	222	248	108	356

SCHOOL EXPENDITURES AND SCHOOL QUALITY

Table XI (page 31) displays the striking relationship of district wealth and school quality in Bexar County. Utilizing a wider series of indicators than we did for the larger sample, we find fairly clear patterns of direct correlations between wealth and school quality. In Bexar County as in the State as a whole, the richer school districts appear to be purchasing better quality education for their pupils.

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[1]Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

[2]*Ibid.*

[3]*Ibid.*

[4]*Ibid.*

[5]*Ibid.*

TABLE XI

THE RELATIONSHIP BETWEEN DISTRICT WEALTH AND EDUCATIONAL QUALITY

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUATION AND SELECTED INDICATORS OF EDUCATIONAL QUALITY

Selected Districts From High to Low by Market Valuation[1] Per Pupil	Professional Salaries Per Pupil[2] Per Cent	Teachers With[3] College Degrees	Masters Degrees	Per Cent of Total Staff With Emergency Permits[4]	A Student Counselor Ratios[5]	Professional Personnel Per 100 Pupils
ALAMO HEIGHTS	$372.00	100%	40%	11%	645	4.80
NORTH EAST	288.00	99	24	7	1516	4.50
SAN ANTONIO	251.00	98	29	17	2320	4.0
NORTH SIDE	258.00	99	20	17	1493	4.30
HARLANDALE	243.00	94	21	22	1800	4.00
EDGEWOOD	209.00	96	15	47	3098	4.06

[1]Policy Institute, Syracuse University Research Corporation, Syracuse, New York.
[2]*Ibid.*
[3]U. S. District Court, Western District of Texas, San Antonio Division, *Answers to Interrogatories*, Civil Action No. 68-175-SA.
[4]*Ibid.*
[5]*Ibid.*

Respectfully submitted,

JOEL S. BERKE
Director
Educational Finance &
Governance Program of the
Policy Institute
Syracuse Univ. Research Corp.
Syracuse, New York

Sworn to before me this 1st day of October, 1971.

HELEN P. MARION
Notary Public

My commission expires: June 1, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

AFFIDAVIT

My name is Don Webb. I am Associate Professor of Economics, Trinity University. I hold a B.A. Degree from Austin College and a Masters of Arts and Ph.D. in Economics from Southern Methodist University. For the past seven years I have taught Economics at Trinity University. One of my fields of specialization is Urban Government Fiscal Issues and Public Finance. I have given particular study to the use of local property taxes in financing Texas public schools.

Initially, in attempting to analyze the financing of Texas public schools, one must consider that, although the costs of education (i.e., the cost of buildings, supplies and personnel) vary slightly throughout the state, it remains generally the same within a single metropolitan area. In the present suit, at least part of each school district named is located within the city of San Antonio. The named districts, which have 93% of the public school students in Bexar County, are all located in the San Antonio metropolitan complex (a single urban economic area whose citizens reside and work within it).

Since all the districts are within this single metropolitan area, the inequities of their fiscal capacity to raise and collect tax revenues for the maintenance and

operation of their schools can be clearly demonstrated. Costs are the same, and they utilize the same employment pool.

Imagine first that each district has on its tax rolls an equal value of taxable property. Attached herewith is Chart 1 which assumes market value of property in each district at $100. The ratio at which each district assesses is then noted (shown also as "Assessed Value"). Following is the tax rate per $100 of assessed value, (shown also is tax per $100 of assessed value). Finally, each district's tax is shown as a percent of the market value of its taxable property—"tax effort". Significantly, Edgewood, is taxing at 1.05% of market value while both Northeast and Alamo Heights are each making a lesser tax effort.

Not reflected in such tax effort figures, however, are the differences in family income. Dr. Charles Feldstone of the Trinity University Urban Data Bank has furnished me with the figures that I have attached to this affidavit as Chart 2, showing median per capita income and median per household income in each of the named districts.

Using an annual income of $4000 for a family of four living in an urban area as the line of demarcation between poverty and non-poverty (the figure established by the Social Security Administration in 1962 and adjusted for today's inflation), it is clear that the median income in Edgewood and other poor districts in Bexar County falls very close to the poverty level. And, at that level, the Social Security Administration estimates families must spend all of their income for necessaries—approximately one-third of total income going for food, approximately one-fourth for rent, and the remaining income (roughly $117 per month) must

cover costs of clothing, transportation, house furnishings, medical and personal needs and insurance.

The ability of these poor, therefore, to pay taxes is almost non-existent, and as income increases above the poverty level, "ability to pay" taxes also increases. Other conditions being equal, a family with an income of $4000 per annum and paying $100 per annum in school taxes is making a greater tax effort than a family whose income is $8000 per annum and is paying $200 per annum in school taxes. The Federal tax structure recognizes this disparity in "ability to pay" between taxpayers by placing minimal tax liability upon those whose income is below $4000 per year.

Consequently, the willingness of the poor to make a strong tax effort for education as reflected in the high tax efforts of some of the poorest districts merely underscores the strong motivation of all citizens, regardless of income, to provide quality education for their children.

Looking only at tax effort one might expect to find those districts making the greatest effort are able to maintain the highest expenditure levels per student. This, however, is not the case. Chart 3 shows the amount of state funds spent per student by each of the named districts. Without exception, every school district with high property values per student spends substantially more per student for education than those districts with low property values per student (see Chart 4). The conclusion is obvious: it is those school districts with high tax bases that are able to support high expenditure school programs with tax rates and efforts that are relatively low, while school districts with low tax bases are unable to support such programs—even with tax rates and efforts that are substantially higher.

The impossibility of poor school districts raising their levels of income and expenditures to the wealthier districts' levels is illustrated by Chart 5. The only available means Edgewood has to raise its income and expenditures to the other districts as shown in Chart 3 is to increase its local ad valorem taxes to raise funds per student comparable to those raised by the other districts. To reach Northeast's level, Edgewood taxes must be increased almost eight times, and to reach Alamo Heights' level, Edgewood taxes would have to be increased nearly six times.

DON WEBB

STATE OF TEXAS :
COUNTY OF BEXAR :

BEFORE ME, the undersigned authority, on this day personally appeared Don Webb, who, being by me first duly sworn, on his oath deposes and says:

I am the Affiant in the above entitled and numbered cause, and that the matters stated in the above and foregoing Affidavit are true and correct.

DON WEBB

SUBSCRIBED and SWORN to before me under my official hand and seal this 30th day of Sept., 1971.

MARY MYERS
Notary Public in and for
Bexar County, Texas.

CHART NO. 1

1970

BASIS OF TAXATION FOR BEXAR COUNTY SCHOOL DISTRICTS*

School District	Alamo Heights	East Central	Edgewood	Harlandale	Judson	Northeast	Northside	San Antonio ISD	Somerset	South San Antonio	Southside	Southwest
Market Value (MV)	$100	$100	$100	$100	$100	$100	$100	$100	$100	$100	$100	$100
Assessed Ratio (AR)	0.486	0.50	0.70	0.588	0.644	0.60	0.571	0.435	0.328	0.627	0.90	0.80
Assessed Value (AV)	48.6	50.0	70.0	58.8	64.4	60.0	57.1	43.5	32.8	62.7	90.0	80.0
Tax Rate per $100 of AV	$1.75	$1.88	$1.50	$1.52	$1.20	$1.50	$1.79	$1.74	$1.20	$1.60	$1.89	$1.20
Tax per $100 of AV	$0.85	$0.94	$1.05	$0.89	$0.77	$0.90	$1.02	$0.76	$0.39	$1.00	$1.70	$0.96
Tax as percent of MV	0.85	0.94	1.05	0.89	0.77	0.90	1.02	0.76	0.39	1.00	1.70	0.96

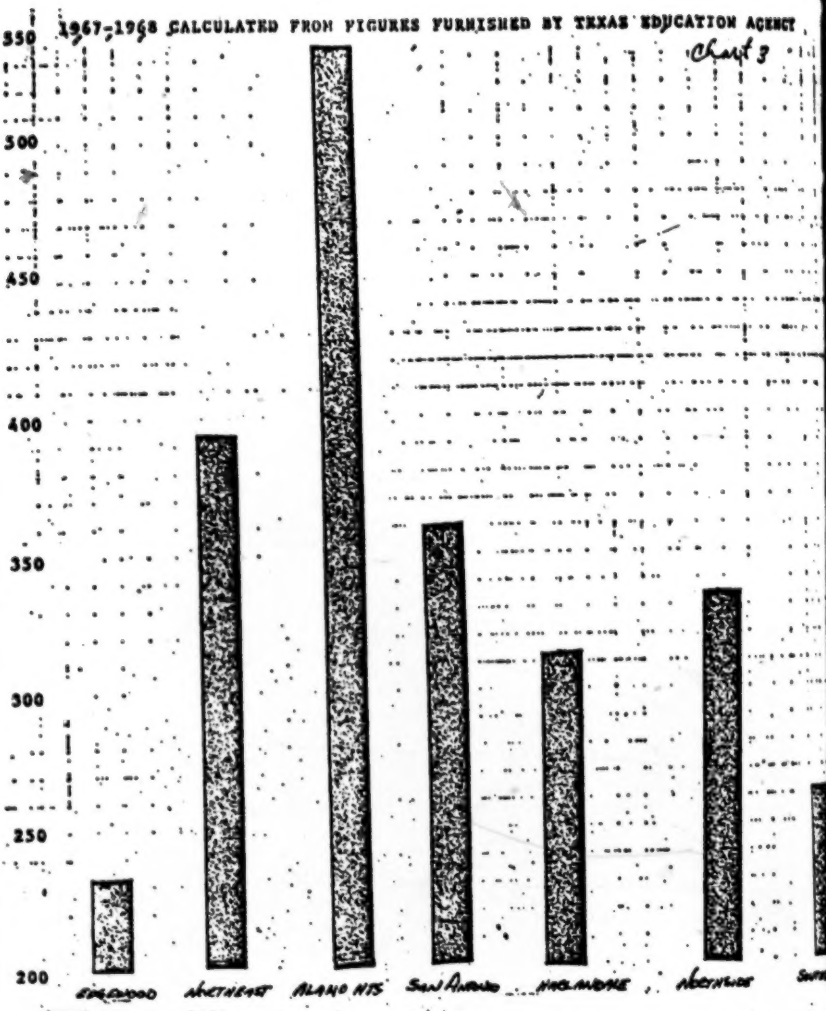
*data obtained from *Texas Municipal Reports* (Austin: Municipal Advisory Council of Texas, 1971).

CHART NO. 2

School District	Median Per Capita Income	Median Income Per Household
Alamo Heights	$2,807.59	$8,001.64
Edgewood	995.01	4,686.53
Harlandale	1,453.70	5,553.16
Northeast	2,618.05	8,927.56
Northside	2,042.75	7,313.07
San Antonio Independent School District	1,493.33	4,928.87
South San Antonio	1,357.62	5,091.09

1967-1968 CALCULATED FROM FIGURES FURNISHED BY TEXAS EDUCATION AGENCY

Chart 3



EDGEWOOD	$231
NORTH EAST	$393
ALAMO HTS.	$543
SAISD	$360
HARLANDALE	$313
NORTHSIDE	$335
SOUTH SAN	$272

CHART NO. 3

Chart of

MARKET VALUE OF PROPERTY PER STUDENT FOR NAMED DISTRICTS - CALCULATED BY DIVIDING 1967-1968 MKT. VALUES AS PROVIDED IN GOVERNOR'S REPORT BY 1967-1968 ENROLLMENT AS ANSWERED BY TEXAS EDUCATION AGENCY IN INTERROGATORY II (b), Set I.

EDGEWOOD	$ 5,429.
NORTHEAST	$28,317.
ALAMO HTS.	$45,095.
SAISD	$19,659.
HARLANDALE	$10,463.
NORTHSIDE	$20,330.
SOUTH SAN	$ 9,974.

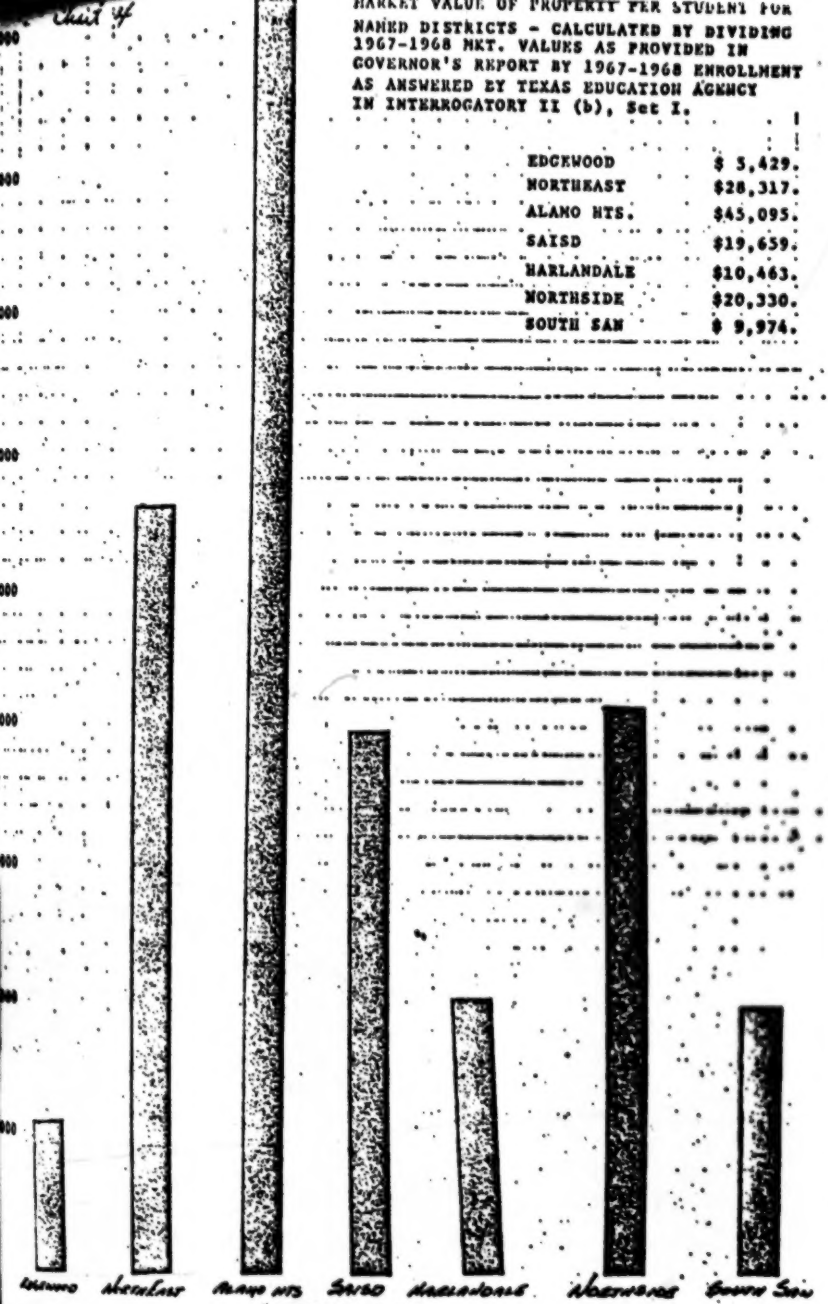
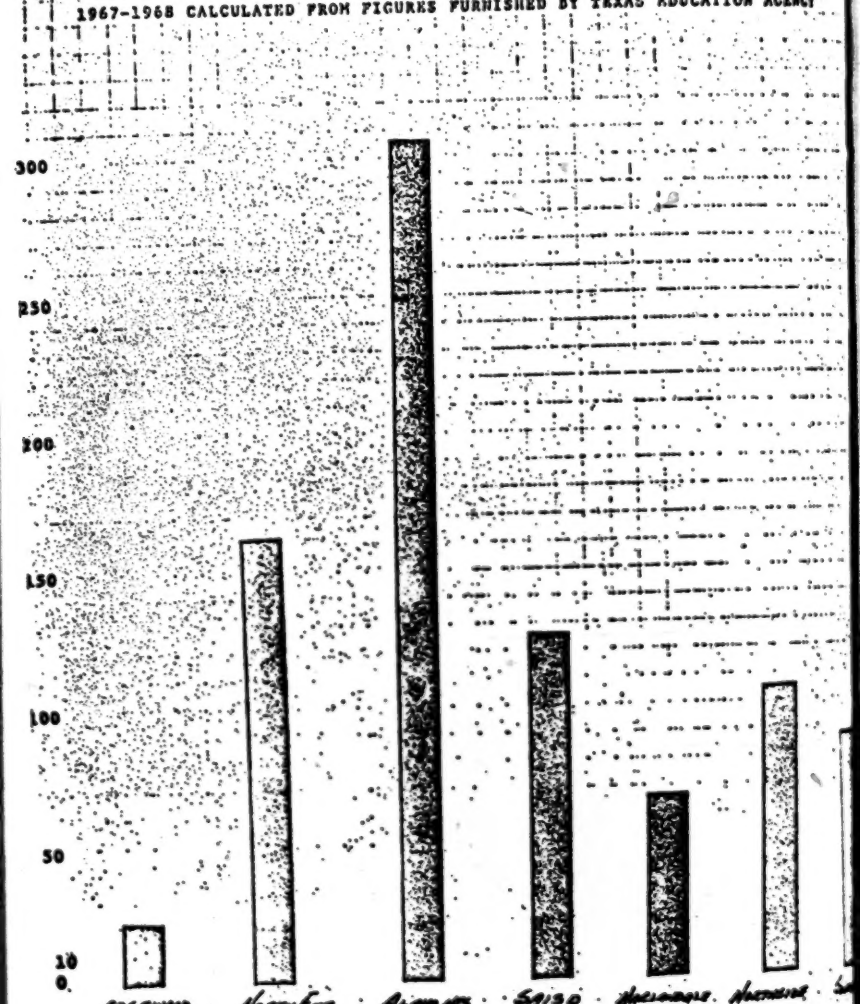


CHART NO. 4

FUNDS PROVIDED PER PUPIL FROM LOCAL AD VALOREM TAXES
1967-1968 CALCULATED FROM FIGURES FURNISHED BY TEXAS EDUCATION AGENCY



EDGEWOOD	$ 21.
NORTHEAST	$161.
ALAMO HTS.	$307.
SAISD	$125.
HARLANDALE	$ 67.
NORTHSIDE	$106.
SOUTH SAN	$ 88.

CHART NO. 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

AFFIDAVIT

My name is J. Richard Avena. I am the Director of the Southwestern Field Office for the United States Commission on Civil Rights. I have been employed by the Commission for approximately four years. Prior to this, I was a Researcher and Translator for the Legislative Reference Service of the Library of Congress in Washington, D. C. The United States Commission on Civil Rights is an independent bipartisan factfinding agency established by the United States Congress under the Civil Rights Act of 1957 as part of the Executive Branch of government. It is the duty of the Commission to:

1. Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion or national origin, and, in the case of Federal elections, by fraudulent practices.

2. Appraise the laws and policies of the Federal Government with respect to denial of equal protection of the laws under the United States Constitution.

3. Collect and study information concerning legal developments constituting a denial of equal protection of the laws under the United States Constitution.

4. Serve as a national clearinghouse for civil rights information.

5. Submit reports of its activities, findings and recommendations to the President and the United States Congress.

6. Analyze past and present patterns of discrimination.

In furtherance of its duties, the Commission on Civil Rights investigates charges of discrimination against Mexican-Americans, conducts hearings, collects evidence and publishes findings. These reports (such as that issued after a 6-day hearing in San Antonio) clearly document a pattern of discrimination against Mexican-Americans in Texas and in other southwestern states having a common border with Mexico. This pattern of discrimination includes discrimination in education, housing and employment.

In the field of education, in the past, there have been segregated schools for Mexican-Americans in Texas. Wherever Mexican-Americans have lived in large numbers in Texas, there have been discriminatory practices in housing. At the time the school district lines which we are concerned with were being drawn, Texas courts were enforcing deed restrictions that barred Mexican-Americans from any but the poorest neighborhoods. And, in the field of employment, in Texas and throughout the Southwest, Mexican-Americans have been purposefully excluded from the better paying jobs in professional, technical, managerial and craft occupations.

This discrimination has resulted in a generally poorer education, more substandard housing, more limited job opportunities, smaller incomes and more deprivation of civil and political rights for Mexican-

Americans (and more specifically for those Mexican-Americans who reside within the Edgewood District) than for other white Americans in Texas.

J. Richard Avena

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

AFFIDAVIT

I am Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District, a core city school district in Bexar County, Texas. Situated in the western section of the City of San Antonio, it covers an area of 14 square miles and includes some 25,000 school age children. The property in the district is mostly residential. There is an absence of industry and little business and commercial property. Edgewood is a poor district with a low tax base. As a result, its ad valorem tax revenues fall far short of the monies available in other Bexar County school districts. With this inequitable financing of its schools, Edgewood cannot hire sufficient qualified personnel, nor provide the physical facilities, library books, equipment and supplies afforded by other Bexar County districts. In short, all the school districts named in this lawsuit, except Edgewood, collect and spend substantially more money per student than Edgewood and as a consequence are able to provide a higher quality of education for their students than Edgewood is able to provide.

The State financing system of numerous independent school districts in the same geographic metropolitan area, providing for separate and independent taxing units, taxing rates, and resultant tax income, allows for

the condition that exists in which there are such vast differences in educational facilities and money spent for each student's education. Certainly that part of the State financing system which requires independent school districts to retain and expend, within their respective boundaries all of the school taxes collected for the educational purposes of such respective districts and the use of a "school district" as a unit for varying allocation of educational funds accomplishes no educational objectives.

Three years ago the Governor's Committee on Public Education described these inequities in "A Tale of Two Districts", (See Appendix A), the comparison of a core city district and a suburban district in Bexar County. One district had 91 professional personnel beyond the Minimum Foundation program. The other had 45 less than that prescribed by the Minimum Foundation program. One district had 5% of its teachers on emergency permits; the other had 52% on emergency permits. One district received $221 in state aid per ADA; the other received $217 in state aid per ADA. One district had $29,650 in full property value per ADA; the other had $5,875. The deprived district in this comparison was Edgewood. But I would like to go further and relate the tale of two school children, one residing in the Edgewood District and the other a resident of the Northeast District.

To begin with, the student in the Edgewood district is of substantially the same age, aptitude, motivation and ability as the student in the other district named in this suit. Their parents, as well, I can assure you are at least as highly motivated to provide the highest possible education for their children as are parents in the other districts.

To illustrate the Edgewood residents are making a high tax effort, have burdened themselves with one of the highest proportions of bonded indebtedness in the county to pay for capital improvements and, never, in the history of the district have they failed to approve a bond issue. The desire of the Edgewood residents for quality education for their children might best be evidenced by the choosing of priorities under the Model Cities program. A large portion of the Edgewood district is in the Model Cities area and the residents of this area have made education the first priority. At the outset of the program, they established education as the primary goal, willing to postpone the solution of health and housing problems, if necessary, until that goal was achieved.

Yet despite this desire of the Edgewood residents, the Edgewood youngster finds himself without adequate classroom space. One study estimated that the Northeast School District child was being provided with 70.36 square feet as compared to the 50.4 square feet for the Edgewood child. In addition, too few janitors result in poorly kept and maintained buildings. And, the Edgewood child may find himself in one of the school buildings in the Edgewood District with a leaky roof because the district does not have the funds to repair them.

Further, even though the Edgewood student is provided with a classroom text by the State of Texas, the local district is unable to provide him with supplemental text books nor with adequate library books. Approximately 3.9 library books per child are available for the Edgewood student, where in contrast, the Northeast Independent School District provides approximately 9.42 library books per child.

Inadequate funding also directly results in a limited curriculum. Any subject which requires a small teacher child ratio is out for the Edgewood students, or if offered, results in unusually large classes elsewhere. Subjects such as homemaking, conversational language, shorthand, and experimental sciences courses all depend on small classes and individual attention. Such courses are available to the Northeast school child, where the teacher-pupil ratio is 1/19, but cannot be paid for by the resources of the Edgewood district, where the average ratio is 1/28.

Since one third of the work force every year is new in the Edgewood District, the Edgewood child has long learned to do without experienced teachers. Edgewood does receive qualified applicants for its positions, but those same applicants apply in the other Bexar County Districts as well, and Edgewood cannot compete with the salaries such districts offer. In some areas the failure of the Edgewood District to successfully compete for personnel is particularly acute. For example, there are 5,672 children for every counselor in the Edgewood District; Alamo Heights is able to provide a counselor for every 1,319 children, and the Northeast district has 1 counselor for every 1,553 children with the other named districts falling between those extremes. Clearly, there is no chance for the Edgewood youngster to receive the counseling available to his Northeast counterpart.

Because of the Edgewood district's lack of financial capabilities, the Edgewood youngster yearly loses the benefits of those State and Federal programs which are awarded on the basis of matching funds from the individual school district. This directly results in the Edgewood youngster being without an adequate amount of guidance materials and testing supplies that are made

available under these programs. If the Edgewood youth of our example is handicapped, he is also unable to benefit from film and other instructional aids because the media service costs the school district $1.00 per ADA and Edgewood School District cannot afford the additional $23,000 per year from local sources. The same is true of the services of educational television stations. Although the Northeast youngster can take advantage of the programs offered by education channels such as KLRN, the Edgewood youngster does not find these services available because the school district cannot afford one-half of the $30,000 required to participate in such programs.

The bottom lines of Appendix A, showing a Tale of Two Districts vividly reflects two results of the present state financing system. It first shows 32% of Edgewood students leaving school between grades seven and twelve, while in the same period only 8% of the Northeast students dropped out and failed to receive their high school diploma. If all grade levels are examined, my own figures show that the drop out rate for Edgewood is close to 50%. Second, the average senior test score for the Edgewood youngster was 12.1; for the Northeast district senior 19.1.

Edgewood must have greater income per student, so that it will be able to hire better qualified teachers, more counselors, provide better building facilities, scientific equipment, libraries, equipment and supplies, and maintain a broader and better curriculum. Only then will we be able to prevent the irreparable injury to our children that is the result of the present inequitable system.

DR. JOSE CARDENAS

THE STATE OF TEXAS
COUNTY OF BEXAR

Before me, the undersigned authority, on this day personally appeared Dr. Jose Cardenas, who, being by me first duly sworn, on his oath deposes and says:

I am the Affiant in the above entitled and numbered cause, and that the matters stated in the above and foregoing Affidavit are true and correct.

DR. JOSE CARDENAS

Sworn to and Subscribed before me under my official hand and seal this 30th day of September, 1971.

CARLOS R. CONTRERAS
Notary Public in and for
Bexar County, Texas

APPENDIX A

TALE OF TWO DISTRICTS

District Characteristics	Core City District	Suburban District
Enrollment	22,000	23,000
Family Income (Annual)	$ 3,300	$ 7,400
Extra Professional Personnel beyond	(45)	91
Percent of Teachers on Emergency Permits	52%	5%
State Aid Per ADA	$ 217	$ 221
Full Property Value Per ADA	5,875	29,650
Performance Measures		
Dropout Rate (Grades 7-12)	32%	8%
Average Senior Test Score	12.1	19.5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT, ET AL

AFFIDAVIT

I am Dr. Daniel C. Morgan, Jr., Associate Professor of Economics, University of Texas at Austin. Attached as Appendix A is a summary of my professional education, professional work and professional qualifications.

The present Texas system of financing public education deprives poor children, children living in poor districts and racial minorities of an equal educational opportunity. Among the 1300 school districts in Texas there are immense disparities in taxable property per student, and this has resulted in widely varying expenditures for education. This variance cannot be explained by differing municipal policy decisions; rather poor districts are systemically incapable of raising as many education dollars as rich districts—despite the higher tax effort in the former districts. The result of this discrimination is that children in poor districts suffer in any comparison of indicators of educational quality; e.g., academic achievement, functional literacy, numbers of years in school.

These inequities are recognized so far as *local* school revenues are concerned, but there is a too-prevalent impression that the State government's system of education aid overcomes much of this difficulty, or perhaps can overcome much of it. This mistaken belief is that

the *State* government's "Minimal Foundation Program" ("MFP") assures some *minimal* level of education for all children; that it achieves some *equal* level of either education per child or money expenditure per child; that it equalizes the capacity of school districts to support education; and that "MFP" places a much lower effective tax burden on the poorer school districts, thereby offsetting their inherently heavier burdens.

But the present Minimum Foundation Program of Texas does *not* do any of these things. Clearly it does not do them in actual practice, and the system is presently structured so that it is most unlikely ever to do them. This was demonstrated in Morgan and Hayden, ***Elementary and Secondary Education Aid: Toward an Optimal Program for Texas*** (Austin: The Institute of Public Affairs of the University of Texas). See Appendix B.

When one comes to understand the State government's "Minimum Foundation Program" one recognizes that it is actually closer in its nature to an "incentive matching grant" approach to State aid than it is to a true Strayer-Haig "foundation program." Since the classic work by George Strayer and Robert Haig in 1923 most education finance authorities and economists have not advocated the incentive matching grant approach to educational financing. Increasingly, these experts recognize that in practice a pure incentive matching grant system is more apt to increase inequalities than to reduce them, and, second, that the incentive approach assures no minimum and/or equal level of performance or aid. To illustrate these deficiencies, consider the following simple example:

> Assume that Rich District has a tax base of $10,000 per pupil and that Poor District has a tax

base of only $1,000 per pupil (by no means an extreme assumption in Texas today). Suppose that the State government in Austin has established a matching index of one-to-one, meaning that the State will match each dollar's spending by a district with a dollar of aid from the State. Now suppose that Rich District and Poor District make what we will assume to be an equal tax effort: each taxes itself 10 per cent of its tax base in order to provide revenue for education. Rich District then raises $1,000 per pupil while Poor District raises only $100 per pupil. The State government then grants Rich District $1,000 per pupil in State aid while it grants Poor District only $100 per pupil. Or, suppose instead that both districts make whatever tax effort is required of them in order to provide their children with an equal, desirable level of education per pupil. Say that this is $1,000 per student. Then Rich District can achieve it with a 5 per cent tax effort; a 5 per cent rate applied to the $10,000 tax base will yield $500, which the State matches "one-for-one", yielding $1,000 to Rich District. But Poor District will require a 50 per cent tax rate to achieve such level; a 50 per cent rate applied to its $1,000 base will yield $500, which the State will match with $500, thus providing the total $1,000.

When we understand this example and recognize the enormous disparities among Texas' 1300 school districts, we see why the "incentive matching grant" approach to State aid fails to provide equal educational opportunity or even minimal opportunity—while at the same time that it fails to equalize tax effort or wealth among the state's school districts.

Many observers do not see that the present system operating in Texas is a disguised incentive matching grant system. The salary schedule of the misnamed "Minimum Foundation Program", however, illustrates this point; for the salary portion constitutes about

four-fifths of the State government's outlay to its school districts. The salary schedule of MFP causes the State government to provide money to the school districts in accordance with the qualifications of the teachers employed by the school districts: (1) the degree attainments of the teacher; and (2) the number of years of teaching experience of the teacher. The State pays a portion of the teacher's salary: its portion depends on the above qualifications. The following example presents an MFP-type of teacher-salary schedule:

> Suppose that the State government formulates the following schedule for aiding the salaries of five categories of teachers in ascending order of qualifications:
>
> | Category | State Aid to District |
> |---|---|
> | I (lowest) | $1,000 |
> | II | 2,000 |
> | III | 3,000 |
> | IV | 4,000 |
> | V (highest) | 6,000 |
>
> Assume that a one-to-one State formula is operative. And suppose that a given district hires ten teachers. If it is willing and able to hire all ten teachers of lowest quality, it will receive $10,000 from the State, i.e., 10 teachers at $1,000 per teacher. Suppose, by extreme contrast that the district is able to hire all ten teachers of highest quality: it will receive $60,000 from the State, i.e., 10 teachers at $6,000. While the salary schedule may provide an incentive for rich districts to employ higher quality teachers, poor districts are unable to raise the absolute number of dollars required to employ the higher quality teachers. Indeed, a lower tax effort yields the richer districts the revenues required to employ the higher quality teachers.

Thus, the Texas MFP system enables the wealthier districts to gain the most in State aid per pupil with a

minimal tax effort. Moreover, the MFP system grants no aid whatever to Texas school districts for capital expenditures. This forces poorer districts to expend higher percentages of their economic capacities on essentials like school buildings and equipment before utilizing these capacities on the quality and numbers of teachers they employ. Further, in our present context, it is helpful to remind ourselves of "sacrifice theory" in taxation. Under "sacrifice theory"—well formulated in the nineteenth century—an equal percentage of resources taxed away from low "income" families constitutes a greater sacrifice than that same percentage taxed away from higher "income" families.

Thus, despite the nomenclature which is employed in describing the Texas financing scheme, and notwithstanding popular illusions as to its efficacy, the *impact* of that system is clear: the State of Texas has created a class of children which it deems less deserving of education because they are poor or living in poor school districts.

DANIEL C. MORGAN, JR.

STATE OF TEXAS :
COUNTY OF BEXAR :

BEFORE ME, the undersigned authority, on this day personally appeared Dr. Daniel C. Morgan, Jr., who, being by me first duly sworn, on his oath deposes and says:

I am the Affiant in the above entitled and numbered cause, and that the matters stated in the above and foregoing Affidavit are true and correct.

DANIEL C. MORGAN, JR.

SWORN TO AND SUBSCRIBED before me under my official hand and seal this 5th day of October, 1971.

MARY MYERS
Notary Public in and for
Bexar County, Texas.

APPENDIX A

DANIEL C. MORGAN, JR.

I. Degrees:

B.B.A.: University of Texas, 1953 (Finance)
M.A.: University of Texas, 1955 (Economics)
Ph.D.: University of Wisconsin, 1961 (Economics)

II. Titles and Committees, Economics Dept., University of Texas—Austin:

Associate Professor; Full Member, Graduate Faculty; Graduate Advisor, Head Economics 302-303 (Beginner's Courses); Personnel Committee; Welfare Committee; Ad Hoc Committee to Review English Requirements for the Bachelor of Arts Degree, Plan I.

III. Membership in Learned Societies

American Economic Association, National Tax Association, Associate Member Brookings Institution

IV. Selected Publications

Books:

Retail Sales Taxation: An Appraisal of New Issues. University of Wisconsin Press, 1964.

Financing Higher Education in Texas: Needs and Methods. Austin: University of Texas Press, 1965.

Elementary and Secondary Education Aid: Toward an Optimal Program for Texas. Austin: Institute of Public Affairs of the University of Texas, 1970.

Articles:

"Reappraisal of Sales Taxation: Some Recent Arguments," *National Tax Journal,* XVI, No. 1 (1963).

"The Kefauver Drug Hearings in Perspective" *Social Science Quarterly,* June, 1964.

"A Comment on 'A Further Reappraisal of Sales Taxation'," *National Tax Journal,* XVII, No. 3 (1964).

"The Report of the Governor's Committee on Higher Education: Fiscal Aspects," *Public Affairs Comment,* X, No. 6 (1964).

"Equity Considerations of Retail Sales Taxation," in *1965 Proceedings of the Fifty-Eighth Annual Conference on Taxation,"* National Taxation Association.

"The Family Assistance Plan: Background and Relationship to Texas," *Public Affairs Comment,* September, 1970.

"Does the State Government 'Exploit' Its Urban Centers?" *National Tax Journal,* (forthcoming).

V. Honors:

Ford Foundation Fellowship; UT President, Texas Association of College Teachers; Book Review editor, *Journal of Economic Issues;* Liberal Arts Fellow, Harvard; Chairman, Lt. Governor's Advisory Committee on Revenue and Taxation; Member of Citizens Tax Advisory Commission, City of Austin.

APPENDIX B

The actual Texas Minimum Foundation Program determines its payments to its school districts on the basis of "units of need." These units of need are determined by the number of "classroom-teacher units" and "professional units", which are allocated by the State on the basis of the school districts' respective "average daily attendance" during the preceding school year. The allocation of classsrom teacher units is derived from Article 2922-13 of *Vernon's Annotated Revised Civil Statutes of the State of Texas.* One classroom teacher unit is allotted for each certain number of pupils in average daily attendance, with one unit being allotted for lower number of pupils in small districts than in large districts. (The number of pupils required for one unit has varied over the years.) There are also units given for "special-service teachers," such as librarians and nurses; and there are also supervisor or counselor units, exceptional children units, principal units, and superintendent units. The bulk of the cost of the Foundation Program—usually averaging about 80 per cent of the total—derives from the "Salaries" portion. Article 2922-14 of *"Vernon's Statutes"* establishes the State's minimum salary schedule. The funds allocated depend on both the "education" and the "experience" of the employed personnel. "Education" refers to the categories such as "Master's Degree," "Bachelor's Degree," "Three Years College," "Two Years College," "One Year College," "Non-certificate," etc. "Experience" refers to 0 years, 1 year, etc., through 12 years or more for most of the categories of "education," and from 0 years through 26 years or more for the Master's Degree. In addition to "Salaries," the computed cost to the State for a school district is constituted by "Operating Costs" plus "Transportation Costs." "Op-

erating costs" are established in Article 2922-15 of *Vernon's Statutes.* They are based on the number of approved classroom teacher units and exceptional-teacher units employed in a district, with smaller districts receiving a bit more for each approved unit. "Transportation Aid" is established by a formula for its computation in Article 2922-15 of *Vernon's.*

The "Local Fund Assignment" is the portion of the Foundation Program that must be raised by the local school districts themselves. The percentage can be altered but has generally been 20 per cent in recent decades. The presumed aim is for the districts themselves to pay 20 per cent of the MFP bill in accordance with their respective fiscal capacities. (Actually, the districts are charged with the specified percentage, like 20 per cent, of the MFP for the immediately preceding year.) In actual practice the computation of the Local Fund Assignment has been quite complicated and has failed to achieve any "equalization" among districts of varying fiscal capacity. (For an explanation of what the complexities of the system are and why it fails, see *Elementary and Education Aid, op. cit.,* pp. 62-66.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 69-175-SA

(Title Omitted in Printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that the State Board of Education and Porter M. Bailes, Jr., M.D., Vernon Baird, Jack Binion, Doyle Corley, William H. Evans, Paul G. Greenwood, E. R. Gregg, Jr., George C. Guthrie, Paul R. Haas, Charles D. Hart, James W. Harvey, Ben R. Howell, Richard Kirkpatrick, Walter R. Kock, Paul Mathews, Carl E. Morgan, Frank M. Pool, Edwin L. Rippy, M.D., Winthrop Seley, James E. Weeks, Herbert O. Willborn, J. W. Edgar, Commissioner of Education, and Crawford C. Martin, Attorney General of Texas, the Defendants above named, hereby appeal to the Supreme Court of the United States from the following portion of the judgment entered in this action on the 23rd day of December, 1971, and the clarification of such judgment entered on the 26th day of January, 1972:

> "(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to said Article 7, sec. 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act (Ch. 16), and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school

system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

"(2) The mandate in this cause shall be stayed, and this Court shall retain jurisdiction in this action for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth, other than the wealth of the State as a whole, as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution. In the event the legislature fails to act within the time stated, the Court is authorized to and will take such further steps as may be necessary to implement both the purpose and the spirit of this order. See *Swann v. Adams,* 263 F.Supp. 225 (S.D. Fla. 1967); *Klahr v. Goddard,* 254 F.Supp. 997 (D. Ariz. 1966). Needless to say, the Court hopes that this latter action will be unnecessary." (December 23, 1971, Judgment).

"(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to the operation of said Article 7, sec. 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against Plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants

the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

"(2) The mandate in this cause shall be stayed for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth other than the wealth of the State as a whole, as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Our holding that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Article 7, sec. 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation Program, shall have prospective application only, and shall not become effective until after the expiration of two years from December 23, 1971. This order shall in no way affect the validity, incontestability, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or contractual obligation incurred by a school district in Texas for public school purposes, nor the validity or enforceability of any tax or other source of payment of any such bond, note, security or obligation; nor shall this judgment in

any way affect the validity, incontestability, obligation of payment, source of payment or enforceability of any bond, note or other security to be issued and delivered, or contractual obligation incurred by Texas school districts, for authorized purposes, during the period of two years from December 23, 1971, nor shall the validity or enforceability of any tax or other source of payment for any such bond, note or other security issued and delivered, or any contractual obligation incurred during such two year period be affected hereby; it being the intention of this Court that this judgment should be construed in such a way as to permit an orderly transition during said two year period from an unconstitutional to a constitutional system of school financing. The Court retains jurisdiction of this action to take such further steps as may be necessary to implement both the purpose and spirit of this order, in the event the Legislature fails to act within the time stated, but, as we understand the law, this constitutes no impediment with respect to the finality of this judgment for the purpose of appeal, and none is intended. See *Swann v. Adams*, 385 U.S. 440 (1967), 263 F.Supp. 225 (S.D. Fla. 1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gunn v. Committee to End the War in Vietnam*, 399 U.S. 383 (1970); and *Klahr v. Goddard*, 254 F.Supp. 997 (D. Ariz. 1966). Needless to say, we hope that no further action by this Court will be necessary." (January 26, 1972, clarification of judgment.)

II.

This appeal is taken pursuant to 27 U.S.C. § 1253.

III.

The Clerk will please prepare and certify a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States in accordance with Rule 12 of the Rules of the United States Supreme Court.

IV.

The following questions are presented by this appeal:

(1) Whether Section 3 of Article VII of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, chapter 16, are in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires equal dollar expenditures or "fiscal neutrality" in the financing plans of the public schools by the State of Texas.

(3) Whether there exists any judicially manageable standards in connection with public school financing by the State of Texas.

(4) Whether the Court has applied the proper test in passing upon the validity of public school financing in the State of Texas.

(5) Whether the Court has the authority to grant affirmative relief in connection with reallocating public funds for financial support of the public schools of the State of Texas.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

(Signature)
PAT BAILEY
Assistant Attorney General

Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Defendants

(Proof of Services Omitted)

Section 3 of Article VII of the Constitution of the State of Texas provides as follows:

> Sec. 3. One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an

additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

OPINIONS AND JUDGMENTS BELOW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.,
v.
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.

Before GOLDBERG, Circuit Judge; SPEARS, Chief District Judge; and ROBERTS, District Judge.

PER CURIAM:

Pursuant to Rule 23, Federal Rules of Civil Procedure, plaintiffs bring this action on behalf of Mexican American school children and their parents who live in the Edgewood Independent School District, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Jurisdiction of this matter is proper under 28 U.S.C. §§ 1331, 1343. This Court finds merit in plaintiffs' claim that the current method of state financing for public elementary and secondary education deprives their class of equal opportunity of the laws under the Fourteenth Amendment to the United States Constitution.[1]

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[1] See Serrano v. Priest, 5 Cal. 3d 584, — P. 2d — (1971); and Van Dusartz v. Hatfield, — F. Supp. — (D. Minn. 1971). Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth, and Van

Edgewood and six other school districts lie wholly or partly within the city of San Antonio, Texas. Five additional districts are located within rural Bexar County. All of these districts and their counterparts throughout the State are dependent upon federal, state, and local sources of financing. Since the federal government contributes only about ten percent of the overall public school expenditures, most revenue is derived from local sources and from two state programs—the Available School Fund and the Minimum Foundation Program. In accordance with the Texas Constitution, the $296 million in the Available School Fund for the 1970-1971 school year was allocated on a per capita basis determined by the average daily attendance within a district for the prior school year.

Costing in excess of one billion dollars for the 1970-1971 school year, the Minimum Foundation Program provides grants for the costs of salaries, school maintenance and transportation. Eighty percent of the cost of this program is financed from general State revenue with the remainder apportioned to the school districts in "the Local Fund Assignment." TEX. EDUC. CODE ANN. arts. 16.71-16.73 (1969). Although generally measuring the variations in taxpaying ability, the Economic Index employed by the State to determine each district's share of "the Local Fund Assignment" (TEX. EDUC. CODE ANN. arts 16.74-16.78) has come under increasing criticism.*

Dusartz points out that in this type case "the variations in wealth are state created. This is not the simple instance in which the poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the state itself has defined and commissioned."

*See THE CHALLENGE AND THE CHANCE, RPT. OF THE GOVERNOR'S COMM. ON PUBLIC SCHOOL EDUC.

To provide their share of the Minimum Foundation Program, to satisfy bonded indebtedness for capital expenditures, and to finance all expenditures above the state minimum, local school districts are empowered within statutory or constitutional limits to levy and collect ad valorem property taxes. TEX. CONST. art. 7, §§ 3, 3a; TEX. EDUC. CODE ANN. art. 20.01, et seq. Since additional tax levies must be approved by a majority of the property-taxpaying voters within the individual districts, these statutory and constitutional provisions require as a practical matter that all tax revenues be expended solely within the district in which they are collected.

Within this ad valorem taxation system lies the defect which plaintiffs challenge. This system assumes that the value of property within the various districts will be sufficiently equal to sustain comparable expenditures from one district to another. It makes education a function of the local property tax base. The adverse effects of this erroneous assumption have been vividly demonstrated at trial through the testimony and exhibits adduced by plaintiffs. In this connection, a survey of 110 school districts" throughout Texas demonstrated that while the ten districts with a market value of taxable property per pupil above $100,000 enjoyed an equalized tax rate per $100 of only thirty-one cents, the poorest four districts, with less than $10,000 in property per pupil, were burdened with a rate of seventy cents. Nevertheless, the low rate of the

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58-68 (1968). The accuracy of the Economic Index is the subject of separate litigation in Fort Worth Ind. School Dist. v. J. W. Edgar, (N.D. Tex., Fort Worth Div.).

"The total number of districts in the state is approximately 1200.

rich districts yielded $585 per pupil, while the high rate of the poor districts yielded only $60 per pupil. As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominantly minority in composition.'

Data for 1967-1968 show that the seven San Antonio school districts follow the statewide pattern. Market value of property per student varied from a low of $5,429 in Edgewood, to a high of $45,095 in Alamo Heights. Accordingly, taxes as a percent of the property's market value were the highest in Edgewood and the lowest in Alamo Heights. Despite its high rate, Edgewood produced a meager twenty-one dollars per pupil from local ad valorem taxes, while the lower rate of Alamo Heights provided $307 per pupil.

Nor does State financial assistance serve to equalize these great disparities. Funds provided from the combined local-state system of financing in 1967-1968 ranged from $231 per pupil in Edgewood to $543 per pupil in Alamo Heights. There was expert testimony to the effect that the current system tends to subsidize the rich at the expense of the poor, rather than the other way around. Any mild equalizing effects that state aid may have do not benefit the poorest districts.

For poor school districts educational financing in Texas is, thus, a tax more, spend less system. The constitutional and statutory framework employed by

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'Plaintiffs' Exhibit VIII shows 1960 median family income of $5,900 in the top ten districts and $3,325 in the bottom four. The rich districts had eight per cent minority pupils while the poor districts were seventy-nine percent minority.

the State in providing education draws distinction between groups of citizens depending upon the wealth of the district in which they live. Defendants urge this Court to find that there is a reasonable or rational relationship between these distinctions or classifications and a legitimate state purpose. This rational basis test is normally applied by the courts in reviewing state commercial or economic regulation. *See, e.g., McGowan v. Maryland,* 366 U.S. 420 (1961); *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955). More than mere rationality is required, however, to maintain a state classification which affects a "fundamental interest," or which is based upon wealth. Here both factors are involved.

These two characteristics of state classification, in the financing of public education, were recognized in *Hargrave v. McKinney,* 413 F. 2d 320, 324 (5th Cir. 1969), *on remand, Hargrave v. Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds sub nom., *Askew v. Hargrave,* 401 U.S. 476 (1971). Among the authorities relied upon to support the *Hargrave* conclusion "that lines drawn on wealth are suspect" is *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668, (1965).[1] In striking down a poll tax requirement because of the possible effect upon indigent voting, the Supreme Court concluded that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifica-

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[1] In addition, the court relied upon Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956), which are decisions invalidating state laws that discriminated against criminal defendants because of their poverty

tions is to introduce a capricious or irrelevant factor." Likewise *McDonald v. Bd. of Elections Comm'rs of Chicago,* 394 U.S. 802, 807 (1969), noted that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."

Further justification for the very demanding test which this Court applies to defendants' classifications is the very great significance of education to the individual. The crucial nature of education for the citizenry lies at the heart of almost twenty years of school desegregation litigation. The oft repeated declaration of *Brown v. Bd. of Education,* 347 U.S. 483, 493 (1954), continues to ring true:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Because of the grave significance of education both to the individual and to our society, the defendants

must demonstrate a compelling state interest that is promoted by the current classifications created under the financing scheme.

Defendants insist that the Court is bound by the opinions in *McInnis v. Shapiro*, 293 F. Supp 327 (N. D. Ill. 1968), aff'd mem. sub nom., 394 U.S. 322 (1969); and *Burrus v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem. sub nom., 397 U.S. 44 (1970). However, we disagree.

The development of judicially manageable standards is imperative when reviewing the complexities of a state educational financing scheme. Plaintiffs in *McInnis* sought to require that educational expenditures in Illinois be made solely on the basis of the "pupils' educational needs." Defining and applying the nebulous concept "educational needs" would have involved the court in the type of endless research and evaluation for which the judiciary is ill-suited.* Accordingly, the court refused the claim that the equal protection clause of the Fourteenth Amendment demands such an unworkable standard. The subsequent affirmance, without opinion, by the Supreme Court would not, in our opinion, bar consideration of plaintiffs' claim that lines in Texas have been drawn on the basis of wealth. The same situation prevails with respect to *Burrus* where the Court, in referring to the "varying needs" of the students, found the circumstances "scarcely distinguishable" from *McInnis*.

In the instant case plaintiffs have not advocated that

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*Difficulties in defining the term are discussed at note 4, 293 F. Supp. 329.

educational expenditures be equal for each child.[8] Rather, they have recommended the application of the principle of "fiscal neutrality." Briefly summarized, this standard requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole. Unlike the measure offered in *McInnis*, this proposal does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the state may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child.

Considered against this principle of "fiscal neutrality," defendants arguments for the present system are rendered insubstantial. Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications. They urge the advantages of the present system in granting decisionmaking power to individual districts, and in permitting local parents to determine how much they desire to spend on their children's schooling. However, they lose sight of the fact that the state has, in truth and in fact, limited the choice of financing by guaranteeing that "some districts will spend low (with high taxes) while others will spend high (with low taxes)."[9] Hence, the present system does not serve to

[8] Indeed, it is difficult to see how the defendants reach a contrary conclusion since even the McInnis plaintiffs did not request precisely equal expenditures per child.

[9] As the Court said in Van Dusartz v. Hatfield, supra, note 1: "By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the eco-

promote one of the very interests which defendants assert.

Indicative of the character of defendants' other arguments is the statement that plaintiffs are calling for "socialized education." Education like the postal service has been socialized, or publicly financed and operated almost from its origin. The *type* of socialized education, not the question of its existence, is the only matter currently in dispute. One final contention of the defendants however calls for further analysis. In essence, they argue that the state may discriminate as it desires so long as federal financing equalizes the differences. Initially, the Court notes that plaintiffs have successfully controverted the contention that federal funds do in fact compensate for state discrimination.[8] More importantly, defendants have not adequately explained why the acts of other governmental units should excuse them from the discriminatory consequences of state law. *Hobson v. Hansen, supra,* 269 F. Supp. at 496, countered defendants' view by finding that the federal aid to education statutes[9]

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nomic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible."

[8] Plaintiffs' Exhibit 8, Table X, indicates that while Edgewood receives the highest federal revenues per pupil of any district in San Antonio, $108, and Alamo Heights, the lowest, $36, the former still has the lowest combined local-state-federal revenues per pupil, $356, and the latter the highest, $594.

[9] The statutes involved were the Economic Opportunity Act, 42 U.S.C. §§ 2781-2791 (1964); the Elementary and Secondary Education Act, 20 U.S.C. §§ 241a-411 (1970 Supp.), and federally impacted areas aid, 20 U.S.C. §§ 236-244 (1964), *as amended,* (1970 Supp.).

> . . . are manifestly intended to provide extraordinary services at the slum schools, not merely to compensate for inequalities produced by local school boards in favor of their middle-income schools. Thus, they cannot be regarded as curing any inequalities for which the Board is otherwise responsible.

Since they were designed primarily to meet special needs in disadvantaged schools, these funds cannot be employed as a substitute for state aid without violating the Congressional will. Further support for this view is offered by a series of decisions prohibiting deductions from state aid for districts receiving "impacted areas" aid.[10] Performance of its constitutional obligations must be judged by the state's own behavior, not by the actions of the federal government.

While defendants are correct in their suggestion that this Court cannot act as a "super-legislature," the judiciary can always determine that an act of the legislature is violative of the Constitution. Having determined that the current system of financing public education in Texas discriminates on the basis of wealth

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[10] These cases have held that the statute clearly provides that the aid is intended as special assistance to local educational agencies, and that to permit a reduction in state aid would violate the Congressional intent. Douglas Ind. School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D. S.D. 1968); Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968); Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968); Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F. 2d 337 (9th Cir. 1970), and Triplett v. Tiemann, 302 F. Supp. 1244 (D. Neb. 1969). After these action arose, the statute was amended to prohibit aid to schools in any state which has "taken into consideration payments under this subchapter in determining the eligibility of any local educational agency in that State for State aid . . ." 20 U.S.C. §§ 240 (d) (2) (1969).



by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes, this Court concludes, as a matter of law, that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Article 7, § 3 of the Texas Constitution and the sections of the Education Code relating to the financing of education, including the Minimum Foundation Program.

Now it is incumbent upon the defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education." The selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole.

"On October 15, 1969 this Court indicated its awareness of the fact that the Legislature of Texas, on its own initiative, had authorized the appointment of a committee to study the public school system of Texas and to recommend "a specific formula or formulae to establish a fair and equitable basis for the division of the financial responsibility between the State and the various school districts of Texas." It was then felt that ample time remained for the committee to "explore all facets and all possibilities in relation to the problem area," in order for appropriate legislation to be enacted not later than the adjournment of the 62nd Legislature, and since the Legislature appeared ready to grapple with the problems involved, the trial of this cause was held in abeyance pending further developments. Unfortunately, however, no action was taken during the 62nd Session which has adjourned. Hopefully, the Governor will see fit to submit this matter to one or more special sessions so that members of the Legislature can give these complex and complicated problems their undivided attention.

Accordingly, IT IS ORDERED that:

(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act (Ch. 16), and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

(2) The mandate in this cause shall be stayed, and this Court shall retain jurisdiction in this action for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth, other than the wealth of the State as a whole, as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution. In the event the legislature fails to act within the time stated, the Court

is authorized to and will take further steps as may be necessary to implement both the purpose and the spirit of this order. See *Swann v. Adams,* 263 F. Supp. 225 (S.D. Fla. 1967); *Klahr v. Goddard,* 254 F. Supp. 997 (D. Ariz. 1966). Needless to say, the Court hopes that this latter action will be unnecessary.

Dated December 23, 1971.

IRVING L. GOLDBERG
United States Circuit Judge

ADRIAN A. SPEARS
Chief United States District Judge

JACK ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.,
v.
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Before GOLDBERG, Circuit Judge; SPEARS, Chief District Judge; and ROBERTS, District Judge.

CLARIFICATION OF ORIGINAL OPINION

PER CURIAM:

Having fully considered defendants' motion for clarification of judgment and the plaintiffs' response thereto, as well as the amicus curiae briefs submitted, the Court is of the opinion that the requests in said motion constituting nothing more than "clarifications" are already implicit in the full context of the language contained in our original opinion; nevertheless, in an attempt to dispell all possible doubt as to what was intended, prevent disruptions in the operation of the public school system in Texas, and avoid further delay on the final disposition of this litigation, it is ORDERED that paragraphs (1) and (2) on pages 8 and 9 of the opinion of this Court entered on December 23, 1971, be and they are hereby amended to read as follows:

(1) The defendants and each of them be preliminarily and permanently restrained and enjoined

from giving any force and effect to the operation of said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

(2) The mandate in this cause shall be stayed for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth other than the wealth of the State as a whole, as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Our holding that the plaintiffs have been denied

equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Articles 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation Program, shall have prospective application only, and shall not become effective until after the expiration of two years from December 23, 1971. This order shall in no way affect the validity, incontestibility, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or contractual obligation incurred by a school district in Texas for public school purposes, nor the validity or enforceability of any tax or other source of payment of any such bond, note, security or obligation; nor shall this judgment in any way affect the validity, incontestibility, obligation of payment, source of payment or enforceability of any bond, note or other security to be issued and delivered, or contractual obligation incurred by Texas school districts, for authorized purposes, during the period of two years from December 23, 1971, nor shall the validity or enforceability of any tax or other source of payment for any such bond, note or other security issued and delivered, or any contractual obligation incurred during such two year period be affected hereby; it being the intention of this Court that this judgment should be construed in such a way as to permit an orderly transition during said two year period from an unconstitutional to a constitutional system of school financing. The Court retains jurisdiction of this action to take such further steps as

may be necessary to implement both the purpose and spirit of this order, in the event the Legislature fails to act within the time stated, but, as we understand the law, this constitutes no impediment with respect to the finality of this judgment for the purpose of appeal, and none is intended. See *Swann v. Adams*, 385 U.S. 440 (1967, 263 F. Supp. 225 (S.D. Fla. 1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gunn v. Committee to End the War in Vietnam*, 399 U.S. 383 (1970); and *Klahr v. Goddard*, 254 F. Supp. 997 (D. Ariz. 1966). Needless to say, we hope that no further action by this Court will be necessary.

Dated January 26, 1972.

ADRIAN A. SPEARS,
Chief United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each such judge to so act.

Section 3 of Article VII of the Constitution of the State of Texas provides as follows:

Sec. 3. One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out the said tax to provide free text books for the use of children attending the public free schools of this State: provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school districts by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an

additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

CHAPTER 16. FOUNDATION SCHOOL PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS

Section

16.01. Purpose.
16.02. Disposition of Money Appropriated.
16.03. Status of Private and Parochial Schools.
16.04. Program Eligibility.

[Sections 16.05 to 16.06 reserved for expansion]

SUBCHAPTER B. CLASSIFICATION OF PROFESSIONAL POSITIONS AND SERVICES

16.07. Classification.
16.08. Duties of Public School Principals.

[Sections 16.09 to 16.10 reserved for expansion]

SUBCHAPTER C. PROFESSIONAL UNITS

16.11. Professional Units—Allotment—General Rules.
16.12. Professional Units—Allotment Formulas.
16.13. Classroom Teacher Units.
16.14. Vocational Teacher Units.
16.15. Special Service Teacher Units.
16.16. Comprehensive Special Education Program for Exceptional Children.
16.17. Supervisor and/or Counselor Units.
16.18. Principal Units.
16.19. Superintendent Unit.
16.20. Repealed.
16.21. Allocation of Units in Certain Districts.
16.22. Administration—Office Assignments.

[Sections 16.23 to 16.30 reserved for expansion]

SUBCHAPTER D. SALARIES

16.301. Minimum Salary Rules.
16.302. Classroom Teachers: 1969–1970.
16.303. Classroom Teachers: 1970–1971.
16.304. Vocational Teachers, Counselors, Supervisors: 1969–1971.
16.305. Special Service Teachers: 1969–1971.
16.306. Teachers of Exceptional Children: 1969–1971.
16.307. Supervisors and/or Counselors: 1969–1971.
16.308. Principals: 1969–1971.
16.309. Superintendents: 1969–1971.
16.310. 10-Month Year.
16.311. Professional Salaries: Total Cost.
16.312. Salaries: Beginning 1971–1972.

Section
16.313. Promotions, Demotions, Etc.
16.314. Increases in 1974 and 1978.
16.315. Teachers Aides.
16.316. Certified Teachers Holding Law Degree.

[Sections 16.317 to 16.44 reserved for expansion]

SUBCHAPTER E. CURRENT OPERATING COST

16.45. Current Operating Cost.

[Sections 16.46 to 16.50 reserved for expansion]

SUBCHAPTER F. TRANSPORTATION SERVICES

16.51. Transportation Services.
16.52. Public Schools Transportation System.
16.53. County and District Transportation Funds.
16.54. Use of Buses for Extracurricular Activities, Etc.
16.55. Approved School Bus Routes.
16.56. Calculation of Allotment.
16.57. Routes and Systems: Evaluation and Approval.
16.58. Use of Transportation Funds for Other Purposes.
16.59. Rules of Commissioner.
16.60. Appeals.
16.61. Purchase of Vehicles.
16.62. Transportation Allotment for Exceptional Children Program.
16.63. Contract with Public Transportation Company.

[Sections 16.64 to 16.70 reserved for expansion]

SUBCHAPTER G. FINANCING THE PROGRAM

16.71. Financing—General Rule.
16.711. Committee to Study Financing of Program.
16.72. Total Amount Chargeable to Districts.
16.73. Estimate of Total Cost of Program; Local Assignment.
16.74. County Economic Index.
16.741. Livestock Sales From Feedlots.
16.75. County Assignment.
16.76. School District Assignment.
16.77. Notification of Local Fund Assignment.
16.78. Excess of Local Funds Over Amount Assigned.
16.79. Administration of Foundation School Program.
16.80. Dormant School Districts.
16.81. Territory Not in School District.
16.82. Cumulative Effect.
16.83. Falsification of Records, Report.

[Sections 16.84 to 16.860 reserved for expansion]

SUBCHAPTER G–1. FOUR–QUARTER SCHOOL YEAR

Section

16.861. Transition to Four-Quarter System; Curriculum Revision.
16.862. Operation on Quarter Basis.
16.863. Foundation School Program Credit.
16.864. Four-Quarter Operation Authorized.

[Sections 16.865 to 16.90 reserved for expansion]

SUBCHAPTER H. QUARTERLY SEMESTER PILOT PROGRAMS

16.91. Pilot Program.
16.92. Limitation.
16.93. Cost Basis.
16.94. Calculation of Costs.
16.95. State's Share of Cost.

[Sections 16.96 to 16.970 reserved for expansion]

SUBCHAPTER H–1. THREE–SEMESTER PILOT PROGRAMS

16.971. Pilot Program.
16.972. Limitation.
16.973. Cost Basis.
16.974. Calculation of Costs.
16.975. State's Share of Cost.

[Sections 16.976 to 16.979 reserved for expansion]

SUBCHAPTER I. SUPPLEMENTAL STATE SALARY AID TO SCHOOL DISTRICTS

16.98. Supplemental State Salary Aid.

Acts 1971, 62nd Leg., p. 1449, ch. 405, which by sections 1 to 53 incorporated the provisions of certain acts passed during the regular and second called sessions of the 61st Legislature into the Education Code, and which by section 54 repealed the acts so incorporated, provided in sections 55 and 56:

"Sec. 55. Nothing in this Act is intended to make any change in the substantive law, but this Act is merely intended to be a recodification of the present law.

"Sec. 56. If any other Act passed at the same session of the Legislature conflicts with any provision of this Act, the other Act prevails."

Special acts:
Counties of 19,500 to 19,650—Acts 1971, 62nd Leg., p. 1910, ch. 574.

SUBCHAPTER A. GENERAL PROVISIONS

Section 16.01. Purpose

The purpose of the Foundation School Program is to guarantee to each child of school age in Texas the availability of a Minimum Foundation School Program for nine full months of the year and to establish the eligibility requirements for the public school districts of Texas in connection therewith.

§ 16.02. Disposition of Money Appropriated

Appropriations enacted by the legislature for the promotion of the educational opportunities afforded by this state under this Foundational School Program shall be paid in accordance with the requirements and in the manner provided in this chapter.

§ 16.03. Status of Private and Parochial Schools

No provision of this chapter shall be interpreted inimically to the status previously enjoyed by the private or parochial schools operating in this state.

§ 16.04. Program Eligibility

(a) Beginning with the school year 1977–1978, any child in this state over 5 and under 21 years of age at the beginning of the school year, who has not yet graduated from high school, shall be entitled to the benefits of the Basic Foundation School Program for the ensuing school year. Such eligible child shall be admitted tuition-free to the public schools of the district in which he, his parents or legal guardian, resides. Provided, however, that for the school years 1969–1970 through 1976–1977, the qualifying age limits at the beginning of each school year shall be in accord with the following table:

QUALIFYING AGE LIMITS AS OF BEGINNING OF SCHOOL YEAR:

	1969–1970 through 1972–1973	1973–1974 and 1974–1975	1975–1976 and 1976–1977
Beginning Age:			
Years	6	5	5
Months	0	7	4
Highest Age:			
Years	20	20	20

(b) Notwithstanding the provisions of Subsection (a) of this section, the program of preschool education shall be extended first to "educationally handicapped" children as preparation for the regular school program in which such children will participate in subsequent years. For purposes of this section, a child is "educationally handicapped" if he cannot speak, read, and comprehend the English language or if he is from a family whose income, according to standards promulgated by the State Board of Education, is at or below a subsistence level. The program shall include an appreciation for the cultural and familial traditions of the child's parents and also an awareness and appreciation of the broader world in which the child must live; assist the child in developing appropriate language skills; prepare the child to participate in the world of his peers and the broader cultural stream into which he will progressively move as he matures; begin the development of the mental and physical skills and cooperative attitudes needed for adequate performance in a school setting; and begin the development of his unique character and personality traits.

(c) The benefits of this program for preschool education shall be extended on a first priority basis to "educationally handicapped" children below existing age limits as shown in the following table:

QUALIFYING AGE LIMITS AS OF BEGINNING OF SCHOOL YEAR:

	1970–1971	1971–1972	1972–1973 and Thereafter
Beginning Age:			
Years	5	5	5
Months	5	2	0
Highest Age:			
Years	21	21	21

(d) A scholastic is a student in average daily attendance within the age limits prescribed in this section.

Added by Acts 1971, 62nd Leg., p. 1507, ch. 405, § 29, eff. May 26, 1971.

[Sections 16.05 and 16.06 reserved for expansion]

SUBCHAPTER B. CLASSIFICATION OF PROFESSIONAL POSITIONS AND SERVICES

§ 16.07. Classification

To effectuate the Foundation School Program here guaranteed, school districts are authorized to utilize the following professional positions, or units, and services:

(1) professional positions;

(A) classroom teachers;

(B) vocational teachers;

(C) special service teachers, among which shall be included librarians, school nurses, school physicians, visiting teachers, and itinerant teachers;

(D) teachers of exceptional children;

(E) supervisors and/or counselors;

(F) principals, part-time;

(G) principals, full-time;

(H) superintendents; and

(2) services;

(A) current operating cost other than professional salaries and transportation; and

(B) transportation.

§ 16.08. Duties of Public School Principals

Public school principals, who shall hold valid administrative certificates, shall be responsible for:

(a) assuming administrative responsibility and instructional leadership, under the supervision of the superintendent, for discipline, and the planning, operation, supervision, and evaluation of the educational program of the attendance area in which he is assigned;

(b) submitting recommendations to the superintendent concerning assignment, evaluation, promotion, and dismissal of all personnel assigned to the attendance center; and

(c) performing any other duties assigned by the superintendent pursuant to school board policy.

(d) Nothing herein shall be construed as a limitation on the powers, responsibilities and obligations of the school board as now prescribed by law.

Added by Acts 1971, 62nd Leg., p. 81, ch. 44, § 1, eff. April 1, 1971.

[Sections 16.09 and 16.10 reserved for expansion]

SUBCHAPTER C. PROFESSIONAL UNITS

§ 16.11. Professional Units—Allotment—General Rules

(a) The total number of professional units allotted to each district shall be the sum of the professional units, hereinafter prescribed, for classroom teachers, vocational teachers, special service teachers, teachers of exceptional children, supervisors and/or counselors, full-time and/or part-time principals, and superintendents.

(b) Such professional unit allotments shall be contingent upon the employment of qualified personnel and upon the payment of not less than the minimum salary as prescribed in this chapter.

(c) No district will be required to employ professional personnel for the full number of professional units for which it is eligible, but where a fewer number are employed, grants shall be based upon the number actually employed during the current school year; and

(d) All personnel allotted under the Foundation School Program shall be allocated to school districts on the basis of current average daily attendance without regard to race, creed, or color of students.

(e) In addition to the method of allocating professional units under the Minimum Foundation Program on the basis of current average daily attendance, any school district may choose to utilize the preceding year's average daily attendance to establish the basis for allocation of professional units in compliance with the formulas in this chapter.

(f) Where a school district is consolidated or contracted with another district, or annexed in whole or part to another district or districts, or where the number of grades taught has been reduced, or where the scholastics are transferred to another district, or where there is an annual fluctuation in the attendance in the district, or where for any reason there is a marked increase or decrease in the attendance of any school district, adjustments in professional allotments shall be made by the state commissioner of education subject to the applicable rules and regulations of the State Board of Education.

(g) Attendance in grades not classified to be taught by the county school board shall not be included in determining professional unit eligibility.

(h) Attendance of non-resident scholastics whose grades are taught in their home districts shall not count for teacher eligibility, unless the transfer of such scholastics has been approved by the county school board and the state commissioner of education.

(i) Any school district which is not dormant as defined in Section 16.80 of this code may, with approval of the boards of trustees of the districts concerned, the county school superintendent, and the state

commissioner of education, contract for a period of one year to transfer its entire scholastic enrollment, both white and colored, to a contiguous district. The scholastic census rolls of both districts shall be combined, the per capita apportionment paid directly to the receiving district, and the combined average daily attendance used in determining the number of professional units for which the receiving district shall be eligible.

(j) Any school district containing 100 square miles or more and having fewer than one pupil per square mile, and which operates and maintains a four-year accredited high school, may be allotted by the state commissioner of education the number of professional units determinable as earned by the application of a sparse-area formula approved by the State Board of Education. The state commissioner of education shall consider in making such allotments the density and distribution of population in the district, road conditions, and the proximity of the school to another four-year accredited high school.

(k) In determining the number of professional units alloted to each school district in the foundation school program, the attendance of orphan, dependents, or neglected children who are wards of the state shall be considered eligible average daily attendance in the receiving school district or districts to which these children are transferred after approval by the county school board and the state commissioner of education.

Subsecs. (d), (e) amended by Acts 1971, 62nd Leg., p. 1510, ch. 405, § 34, eff. May 26, 1971.

§ 16.12. Professional Units—Allotment Formulas

(a) Subject to the general rules set out in Section 16.11 of this code, the number of professional units for each district shall be determined as prescribed in the succeeding sections of this subchapter.

§ 16.13. Classroom Teacher Units

Classroom teacher professional units for each school district shall be determined, and teachers allotted in the following manner:

(1) to school districts having fewer than 15 pupils in average daily attendance, no classroom teacher unit, except that in cases of extreme hardship, such districts may be allotted on a year-to-year basis one classroom teacher unit if so recommended by the county school board and approved by the state commissioner of education;

(2) to school districts having from 15 to 25 pupils, inclusive, in average daily attendance, one classroom teacher unit;

(3) to school districts having from 26 to 109 pupils, inclusive, in average daily attendance, two classroom teacher units for the first 26 pupils and one classroom teacher unit for each additional 21 pupils (no credit to be given for fractions);

(4) to school districts having from 110 to 156 pupils, inclusive, in average daily attendance, six classroom teacher units;

(5) to school districts having from 157 to 444 pupils, inclusive, in average daily attendance, one classroom teacher unit for each 24 pupils, or fractional part thereof in excess of one-half;

(6) to school districts having from 445 pupils to 487 pupils, inclusive, in average daily attendance, 19 classroom teacher units; and

(7) to school districts having from 488 or more pupils in average daily attendance, one classroom teacher unit for each 25 pupils, or fractional part thereof in excess of one-half.

Amended by Acts 1971, 62nd Leg., p. 1506, ch. 405, § 27, eff. May 26, 1971.

§ 16.14. Vocational Teacher Units

(a) Vocational teacher professional units, vocational supervisor professional units, and vocational counselor professional units for each school district shall be determined and allotted as prescribed by this section.

(b) Each school district having a four-year accredited high school shall be eligible, under rules and regulations of the State Board of Education, for two vocational teacher units to teach one or more vocational programs provided there is a need thereof, and provided the programs shall have been approved by the commissioner of education.

(c) Additional vocational teacher units for four-year accredited high schools may be allotted according to needs determined by a survey of the community and approved by the commissioner of education.

(d) A district having an accredited high school which qualifies, according to the rules and regulations of the State Board of Education, for less than one vocational teacher unit, may be allotted by the commissioner of education a fractional part of a vocational teacher professional unit. A fractional part of a vocational teacher professional unit shall entitle a district to employ a part-time vocational teacher or assign a classroom teacher to serve as part-time vocational teacher.

(e) Each school district having a four-year accredited high school shall be eligible, under rules and regulations as approved by the State Board of Education, for such specialized vocational supervisor units

and vocational counselor units as there is a need thereof, and in the number determined by application of formulas adopted by the State Board of Education and subject to approval by the commissioner of education.

(f) Vocational professional unit allotments, except classroom teachers who also served as part-time vocational teachers, shall be made in addition to other professional unit allotments. Vocational teacher units shall be included in determining the total current operating cost for each district. In addition to this allowance, there shall be an additional allocation of $400 for each vocational teacher unit.

(g) School districts which, because of limited enrollments, tax resources, or facilities are unable to offer appropriate vocational education in all occupational areas needed may enter into contracts with post-secondary public institutions, as defined by the State Board of Education, to provide for such appropriate vocational education instruction provided the instructors and instructional materials and equipment utilized meet secondary school program requirements.

(h) Such contracts shall be executed pursuant to rules and regulations of the State Board for Vocational Education (State Board of Education) and the cost to the state shall not exceed the cost that would result if said programs were operated by the respective school districts entering into such contracts.

Amended by Acts 1971, 62nd Leg., p. 1511, ch. 405, § 35, eff. May 26, 1971.

§ 16.15. Special Service Teacher Units

(a) Special service teacher professional units for each school district, which may be separate for whites and Negroes, shall be based upon the number of approved classroom teacher units, and shall be determined and teachers allotted, in addition to other professional unit allotments, in the manner prescribed by this section.

(b) Districts which have 20 or more approved classroom teacher units shall be eligible for one special service teacher unit for each 20 classroom teacher units, no credit to be given for fractions.

(c) Districts not eligible for a full special service teacher unit may enter by vote of their respective boards of trustees, into one cooperative agreement to provide special service teachers, as prescribed in subsection (b) of this section, to be recommended and supervised by the county school superintendent, and employed by the county school board. The state commissioner of education shall, upon the county superintendent's certification of such agreement, allot to each district party thereto a fractional part of a special service teacher unit, said

fraction to be not greater than the number of approved classroom teacher units for that district divided by 20.

(d) School districts may choose from the five types of special service teacher units listed in Section 16.07(1)(C) of this code the number of each classification that it desires, to the extent of total eligibility for such units, but the allocation of special service teacher units shall not preclude the assignment of classroom teachers to special service duties. The state commissioner of education shall establish qualifications for special service teachers which shall be subject to regulations made by the State Board of Education.

§ 16.16. Comprehensive Special Education Program for Exceptional Children

(a) It is the intention of this section to provide for a comprehensive special education program for exceptional children in Texas.

(b) As used in this section:

(1) "Exceptional children" means children between the ages of 3 and 21, inclusive, with educational handicaps (physical, retarded, emotionally disturbed, and/or children with language and/or learning disabilities) as hereinafter more specifically defined; and children leaving and not attending public school for a time because of pregnancy—which disabilities render regular services and classes of the public schools inconsistent with their educational needs.

(2) "Physically handicapped children" means children of educable mind whose body functions or members are so impaired from any cause that they cannot be adequately or safely educated in the regular classes of the public schools without the provision of special services.

(3) "Mentally retarded children" means children whose mental capacity is such that they cannot be adequately educated in the regular classes of the public schools without the provision of special services.

(4) "Emotionally disturbed children" means children whose emotional condition is medically and/or psychologically determined to be such that they cannot be adequately and safely educated in the regular classes of the public schools without the provision of special services.

(5) "Language and/or learning disabled children" means children who are so deficient in the acquisition of language and/or learning skills including, but not limited to, the ability to reason, think, speak, read, write, spell, or to make mathematical calcula-

tions, as identified by educational and/or psychological and/or medical diagnosis that they must be provided special services for educational progress. The term "language and/or learning disabled children" shall also apply to children diagnosed as having specific developmental dyslexia.

(6) "Special services" required for the instruction of or program for exceptional children means special teaching in the public school curriculum within and/or without the regular classroom; corrective teaching, such as lipreading, speech correction, sight conservation, corrective health habits; transportation, special seats, books, instructional media and supplies; professional counseling with students and parents; supervision of professional services and pupil evaluation services; established teaching techniques for children with language and/or learning disabilities.

(c) Under rules, regulations and/or formulae adopted by the State Board of Education subject to the provisions of this section, exceptional children teacher units, in addition to other professional and paraprofessional unit allotments herein authorized, shall be allotted to any eligible school district in the number determinable thereunder. Exceptional children teacher units for pupils who are both severely physically handicapped and mentally retarded shall be allocated on a separate formula from other type units.

(d) Professional personnel for the operation and maintenance of a program of special education shall be:

(1) exceptional children teachers;

(2) special education supervisors;

(3) special education counselors;

(4) special service teachers, such as itinerant teachers of the homebound and visiting teachers, whose duties may or may not be performed in whole or in part on the campus of any school; and

(5) psychologists and other pupil evaluation specialists. The minimum salary for such specialist to be used in computing salary allotment for purposes of this section shall be established by the commissioner of education.

(e) Paraprofessional personnel for the operation and maintenance of a program of special education shall consist of persons engaged as teacher aides, who may or may not hold a teacher certificate. The qualifications and minimum salary levels of paraprofessional personnel for salary allotment purposes of this section shall be established by the commissioner of education.

(f) Quantitative bases for the allotment of all special education unit personnel under Subsection (c) of this section shall be established by the commissioner of education under rules adopted by the State Board of Education. Any school district, at its expense, may employ any special education personnel in excess of its state allotment, may supplement the minimum salary allotted by the state for any special education personnel, and any district is authorized at local expense to pay for all or part of further or continuing training or education of its special education personnel.

(g) Special education unit personnel may be employed and/or utilized on a full-time, part-time, or upon a consultative basis, or may be allotted by the commissioner of education, pursuant to cooperative districts' agreement, jointly to serve two or more school districts. Two or more school districts may operate jointly their special education program and any school district may contract where feasible with any other school district for all or any part of the program of special education for the children of either district, under rules and regulations established by the commissioner of education.

(h) To each school district operating an approved special education program there shall also be allotted a special service allowance in an amount to be determined by the commissioner of education for pupil evaluation, special seats, books, instructional media and other supplies required for quality instruction.

(i) To each school district operating an approved special education program, there shall be allotted also a transportation allowance for transporting of children in special education programs who are unable to attend the special education program for exceptional children in public school unless such special transportation is provided. The annual transportation allotment shall be $150 per exceptional child pupil receiving such transportation. Such allocated transportation funds shall be used only for transportation purposes for children who are enrolled in a program of special education or who are eligible for such enrollment.

(j) The minimum monthly base pay and increments for teaching experience for an exceptional children teacher or a special service teacher conducting a 9, 10, 11, or 12 months special education program approved by the commissioner of education shall be the same as that of a classroom teacher as provided in the Foundation Program Act: provided that special education teachers shall have qualifications approved by the commissioner of education. The annual salary of special education teachers shall be the monthly base salary, plus increments, multiplied by 9, 10, 11, or 12, as applicable.

(k) The minimum monthly base pay and increments for teaching experience for special education counselors and supervisors engaged

in a 9, 10, 11, or 12 months special education program approved by the commissioner of education shall be the same as that of a counselor and/or supervisor as provided in the Foundation Program Act; provided that such counselors and supervisors shall have qualifications approved by the commissioner of education. The annual salary of special education counselors and supervisors shall be the monthly base salary, plus increments, multiplied by 9, 10, 11, or 12, as applicable.

(*l*) The salary costs of special education teacher units, other professional and paraprofessional units authorized in Subsections (c), (d), and (e) of this section, operating costs as provided in Subsection (h), and transportation costs as provided in Subsection (i), computed as other costs of the Foundation School Program Act for local fund assignment purposes thereof, shall be paid from the Foundation Program School Fund. Provided further, that any school district may supplement any part of the comprehensive special education program it operates or participates in with funds or sources available to it from local source, public and/or private.

(m) Under rules and regulations of the State Board of Education, eligible school districts may contract with nonprofit community mental health and/or mental retardation centers, public or private, or any other nonprofit organization, institution, or agency approved by the State Board of Education, for the provision of services to exceptional children as defined by this section, who reside with their parents or guardians.

(n) Special education program units shall be included in determining the total current operating cost for each district.

(o) The Foundation School Fund Budget Committee shall compute all amounts required for comprehensive special education program purposes to be included in the amounts to be placed in the Foundation School Fund for the ensuing biennium at the same time that certifications are made for other Foundation School Fund purposes.

Amended by Acts 1971, 62nd Leg., p. 1491, ch. 405, § 19, eff. May 26, 1971.

§ 16.17. Supervisor and/or Counselor Units

(a) The state commissioner of education shall establish, subject to regulations by the State Board of Education, qualifications for supervisors and counselors. Supervisor and/or counselor professional units for each school district, which may be separate for whites and Negroes, shall be determined and supervisor and/or counselor units allotted, in addition to other professional unit allotments, as prescribed by this section.

(b) The basic allotment shall be one supervisor or counselor unit for the first 40 classroom teacher units and one supervisor or counselor unit for each additional 50 classroom teacher units, or major fractional part thereof. If a district is eligible for one such unit, the district may employ for such unit either a supervisor or a counselor, but not both. If a district is eligible for two or more such units, the district may employ supervisors only, counselors only, or a combination of the two to the extent of total eligibility.

(c) Districts having fewer than 40 classroom teacher units may enter, by vote of their respective governing boards, into one cooperative agreement to provide supervisors and/or counselors to be recommended and supervised by the county superintendent and employed by the county school board. Under such agreements the combined classroom teacher units of the cooperating districts shall be used in calculating eligibility for supervisor and/or counselor units, but if the county employs a supervisor from the county administrative funds, 40 classroom teacher units shall be deducted from the combined total. The state commissioner of education shall, upon the county superintendent's certification of such agreement, allot to each district party to such agreement a fractional part of a supervisor or counselor unit, said fraction to be not greater than the number of approved classroom teacher units for that district divided by 40.

§ 16.18. Principal Units

(a) Principal units shall be of two types: full-time principal units and part-time principal units. A part-time principal unit shall entitle a district to assign a classroom teacher to serve as a part-time principal and to receive an additional salary allowance as hereinafter provided in this chapter.

(b) The principal unit allotment as hereinafter provided shall be based upon the number of approved classroom teacher units and shall be made in addition to other professional unit allotments. Principal units for each school district, which may be separate for whites and Negroes, shall be determined and alloted as prescribed in this section.

(c) No district having fewer than three approved classroom teacher units shall be eligible for a principal allotment.

(d) To districts having from three to 19 classroom teacher units and not having an accredited four-year high school, one part-time principal unit shall be allotted.

(e) To districts having from nine to 19 classroom teacher units and having a four-year accredited high school, two part-time principal units shall be allotted. Additional part-time principal units shall be allotted. Additional part-time principal units shall be allotted, if nec-

essary, to the extent that at least one part-time principal will be available for each campus on which a school with more than two classroom teachers is operated in the district.

(f) To districts having 20 or more approved classroom teacher units there shall be allotted one full-time principal unit for the first 20 classroom teacher units and one full-time principal unit for each additional 30 classroom teacher units, but fractions shall not be considered in computing principal allotments.

(g) Part-time principal units, in addition to full-time principal unit allowances provided above, shall be allowed as follows: one from the first 20 classroom teachers, and one from each additional 30 classroom teachers. Service as part-time principal shall be in addition to part-time classroom duties. Those so designated shall receive an additional allowance as hereinafter provided in this chapter. Additional part-time principal units shall be allotted, if necessary, to the extent that at least one full-time or part-time principal will be available for each campus on which a school with more than two classroom teachers is operated in the district.

§ 16.19. Superintendent Unit

(a) [1] Superintendents shall serve the entire school district. Allotments for superintendent units as provided for herein shall be made in addition to other professional unit allotments. Superintendent units for each district shall be determined and allotted in the following manner: A district having one or more four-year accredited high schools shall be eligible for one superintendent allotment. A district which does not have a four-year accredited high school shall not be eligible for a superintendent allotment.

[1] There is no paragraph (b) in the enrolled bill.

§ 16.20. Repealed by Acts 1971, 62nd Leg., p. 1533, ch. 405, § 54 (1), eff. May 26, 1971

Section 16.20 provided for the determination of professional units allotment on a combined average daily attendance, and was derived from:

Acts 1965, 59th Leg., p. 1029, ch. 509.
Acts 1969, 61st Leg., p. 3024, ch. 889, § 2.
Vernon's Ann.Civ.St. art. 2922-13d.

§ 16.21. Allocation of Units in Certain Districts

Notwithstanding the provisions of Sections 16.11 and 16.13 of this code, the number of professional units allocated to school districts which operate and have operated for at least three consecutive years a four-year accredited high school and have an average daily attendance range between 84 and 156 pupils for the immediate preceding

year shall be based on the following formula: a school district having 84 to 106 pupils, inclusive, in average daily attendance shall be allotted six classroom teacher units and a superintendent unit. A school district having 107 to 156 pupils, inclusive, shall be allotted seven classroom teacher units and a superintendent unit.

Amended by Acts 1971, 62nd Leg., p. 1512, ch. 405, § 36, eff. May 26, 1971.

§ 16.22. Administration—Office Assignments

For utilization of classroom teacher unit allotment purposes, the Central Education Agency shall regard and recognize as classroom teacher(s) within the definition of 'teacher' as described in the Texas State Public Education Compensation Plan, teacher certificated personnel employed or assigned by any school district to teach, as classroom teachers, and/or to perform administration-office assignments or tasks. (S.B.No.990, 62nd Legis., Reg.Sess., 1971.)

Added by Acts 1971, 62nd Leg., p. 3362, ch. 1024, Art. 2, § 44, eff. Sept. 1, 1971.

[Sections 16.23 to 16.300 reserved for expansion]

SUBCHAPTER D. SALARIES

Subchapter D relating to Salaries, originally consisting of §§ 16.31 to 16.40, was amended by Acts 1971, 62nd Leg., p. 1449, ch. 405, § 26, effective May 26, 1971, to consist of §§ 16.301 to 16.316 relating to the same subject. See, also, the italicized note preceding § 16.01 of this chapter.

§ 16.301. Minimum Salary Rules

(a) The board of trustees of each and every school district in the State of Texas shall pay their teachers upon a salary schedule providing a minimum beginning base salary, plus increments above the minimum for additional experience in teaching as hereinafter prescribed. The salaries fixed herein shall be regarded as minimum salaries only and each district may supplement such salaries.

(b) All teachers and administrators shall have a valid Texas certificate. Salary increments for college training shall be based upon training received at a college recognized by the commissioner of education for the preparation of teachers.

(c) Payment of at least the minimum salary schedule provided herein shall be a condition precedent: (1) to a school's participation in the Foundation School Fund; and (2) to its name being placed

or continued upon the official list of affiliated or accredited schools. The annual salaries as provided herein may be paid in 12 equal payments at the discretion of the local school boards.

(d) The salary of each professional position shall be determined as provided by this subchapter.

§ 16.302. Classroom Teachers: 1969–1970

(a) For the 1969–1970 school year, the annual salary of classroom teachers shall be the monthly base salary, plus increments, multiplied by nine. For the 1970–1971 school year, the annual salary of classroom teachers shall be the monthly base salary plus increments multiplied by 10.

(b) Classroom teachers shall be paid for the school year 1969–1970 on the basis of the following salary schedules:

SALARY SCHEDULE 1969–1970

YEARS OF TEACHING EXPERIENCE

	Salary	0–1	2–3	4–5	6–8	9 or More
Teacher, B.A.	Month	600	630	662	695	730

	Salary	0–3	4–5	6–7	8–10	11–13	14–15	16 or More
Teacher, M.A.	Month	660	695	730	767	805	845	866

(c) The above schedule reduced by $7 per month at each step shall apply to all teaching positions and special service positions authorized under the Minimum Foundation Program, with the provision that all teaching positions authorized for more than nine months shall receive the monthly salary multiplied by the number of months allowed.

(d) Non-degree teachers shall receive .80 of the monthly salary for B.A. degree teachers multiplied by the number of months allowed for the position in which they are employed.

(e) Salaries for the following positions shall be based on the monthly salaries for teachers with the same experience and degree and shall be computed as indicated below:

(1) Supervisors and counselors shall receive 1.06 of the monthly teacher salary multiplied by 10.

(2) Head teachers shall receive 1.08 of the monthly teacher salary multiplied by 9.

(3) Part-time principals shall receive 1.15 of the monthly teacher salary multiplied by 9½.

(4) Full-time principals shall receive 1.20 of the monthly teacher salary multiplied by 11.

(5) Superintendents in districts with 600 ADA or less shall receive 1.25 of the monthly teacher salary multiplied by 12. Superintendents in districts with 601–5,000 ADA shall receive 1.5 of the monthly teacher salary multiplied by 12. Superintendents in districts with 5,001 or more ADA shall receive 1.75 of the monthly salary multiplied by 12.

§ 16.303. Classroom Teachers: 1970–1971

(a) For the 1970–1971 school year, classroom teachers shall be paid on a monthly basis as provided in the schedule below:

SALARY SCHEDULE 1970–1971

SALARY BY STEPS ABOVE BASE

	Base Salary		1	2	3	4	5		
Teacher,	B.A. Month	600	630	662	695	730	767		
	Base Salary		1	2	3	4	5	6	7
Teacher,	M.A. Month	660	695	730	767	805	845	866	888

(b) Beginning teachers shall be paid the base salary. Other teachers shall be placed at the monthly salary step immediately above the monthly salary step in the 1969–1970 salary schedule nearest the monthly salary received by the teacher in 1969–1970. The annual salary for each teacher shall be the appropriate monthly salary multiplied by 10. The above schedule shall apply to all teaching positions and special service positions authorized under the Minimum Foundation Program, with the provision that all teaching positions authorized for more than 10 months shall receive the monthly salary multiplied by the number of months allowed.

(c) Non-degree teachers shall receive .80 of the monthly salary for B.A. degree teachers multiplied by the number of months allowed for the position in which they are employed.

(d) Salaries for the following positions shall be based on the monthly salaries for teachers with the same experience and degree and shall be computed as indicated below:

(1) Supervisors and counselors shall receive 1.20 of the monthly teacher salary multiplied by 10.

(2) Head teachers shall receive 1.08 of the monthly teacher salary multiplied by 10.

(3) Part-time principals shall receive 1.15 of the monthly teacher salary multiplied by 10.

(4) Full-time principals shall receive 1.25 of the monthly teacher salary multiplied by 11.

(5) Superintendents in districts with 600 or less ADA shall receive 1.30 of the monthly teacher salary multiplied by 12. Superintendents in districts with 601–5,000 ADA shall receive 1.50 of the monthly teacher salary multiplied by 12. Superintendents in districts with 5,000–50,000 ADA shall receive 1.75 of the monthly teacher salary multiplied by 12. Superintendents in districts with 50,001 or more ADA shall receive 2.25 of the monthly teacher salary multiplied by 12.

§ 16.304. Vocational Teachers, Counselors, Supervisors: 1969–1971

(a) The minimum monthly base pay and increments for teaching experience for a vocational teacher conducting a 9, 10, or 12 months' vocational program approved by the commissioner of education shall be the same as that of a classroom teacher as provided herein; provided that vocational trade and industrial teachers having qualifications approved by the State Board of Vocational Education shall be eligible for the minimum monthly base pay for a classroom teacher who holds a recognized bachelor's degree and a valid teacher's certificate.

(b) The annual salary of vocational teachers shall be the monthly base salary, plus increments, multiplied by 9, 10, or 12, as applicable for 1969–1970, and by 10, 11, or 12 as applicable for 1970–1971.

(c) The minimum salaries hereinabove prescribed for vocational teachers mean total salaries of such teachers to be received for public school instruction, whether they be paid out of state and/or federal

(e) The minimum monthly base salary and increments for teachers in distributive adult education.

(d) Expenses where allowable shall be paid from a separate vocational fund. No such expense shall be counted as part of the cost of Minimum Foundation School Program.

(e) The minimum monthly base salary and increments for teaching experience for vocational supervisors and vocational counselors shall be the same as that prescribed in the Foundation Program salary schedule for supervisors and counselors. The annual salary for such vocational supervisors and vocational counselors shall be the monthly base salary plus increments multiplied by 10 in the case of vocational counselors and 11 in the case of vocational supervisors. This subsection expires at the end of the 1970–1971 school year.

§ 16.305. Special Service Teachers: 1969–1971

(a) The minimum monthly base salary and increments for teaching experience for special service teachers shall be the same as those provided herein for classroom teachers. The annual salary of such teachers shall be the monthly base salary, plus increments, multiplied by 9 for 1969–1970, and by 10 for 1970–1971.

(b) A registered nurse shall be considered, for the purpose of computing salaries, as having a bachelor's degree, and a librarian having a recognized certificate or degree based upon five years of recognized college training therefor shall be considered as having a master's degree.

§ 16.306. Teachers of Exceptional Children: 1969–1971

The minimum monthly base salary and increments for teaching experience for teachers of exceptional children shall be the same as that prescribed in this subchapter for classroom teachers. The annual salary of such teachers shall be the monthly base salary, plus increments, multiplied by 9 in 1969–1970, and by 10 in 1970–1971, except that in cases where the commissioner of education approves such a unit for more than nine months, the annual salary shall be the monthly base salary, plus increments, multiplied by the number of months approved by the commissioner of education.

§ 16.307. Supervisors and/or Counselors: 1969–1971

The minimum monthly base salary and increments for teaching experience for supervisors and counselors shall be that prescribed in the salary schedules as printed above for 1969–1970 and 1970–1971, respectively.

§ 16.308. Principals: 1969–1971

(a) The minimum monthly base salary and increments for teaching experience for full-time principals shall be in compliance with the provisions set out in the above printed salary schedules for 1969–1970 and 1970–1971, respectively.

(b) The classroom teacher who serves as part-time principal on a campus to which are assigned seven or more classroom teacher units shall receive the salary prescribed for a part-time principal in the 1969–1970 and 1970–1971 schedules for each of these respective years.

(c) The classroom teacher who serves as a part-time principal on a campus to which are assigned three to six classroom teacher units shall receive the salary prescribed for the head teacher in the above-printed salary schedules for 1969–1970 and 1970–1971, respectively. In addition to the allotment of part-time principals as provided in Section 16.18 of this code, districts containing an accredited high school and having fewer than nine classroom teacher units shall be granted one head teacher.

§ 16.309. Superintendents: 1969–1971

The minimum monthly base salary increments for teaching experience for superintendents shall be as prescribed in the salary schedules for 1969–1970 and 1970–1971, respectively.

§ 16.310. 10-Month Year

Beginning with the school year 1970–1971, all classroom teaching positions and all other positions previously authorized for less than 10 months shall be paid at an annual rate calculated on the basis of 10 months' compensation for 10 months' service. Such service shall include the 180-day school term providing instruction for pupils plus not to exceed 10 days of inservice education and preparation for the beginning and ending of the school term.

§ 16.311. Professional Salaries: Total Cost

The total cost of professional salaries of positions allowable for purposes of this subchapter shall be determined by application of the salary schedule to the total number of approved professional units, provided that such professional units are serviced by approved professional position employments.

§ 16.312. Salaries: Beginning 1971–1972

(a) The annual salary of personnel authorized for employment under the Minimum Foundation Program for the school year 1971–1972 and for each year thereafter shall be the monthly base salary, plus increments, shown in the schedule (entitled "Texas State Public Education Compensation Plan") below, multiplied by the number of months prescribed in the position description herein for each respective position. The salaries fixed in this schedule are minimum salaries only, and each district may supplement such salaries.

(b) The following schedule constitutes the Texas State Public Education Compensation Plan effective 1971–1972, and thereafter:

SALARY BY STEPS ABOVE BASE

Pay Grade	Base Monthly Salary	1	2	3	4	5	6	7	8	9	10
1	$ 300	$ 315	$ 331	$ 348	$ 365	$ 383	$ 402	$ 422	$ 443	$ 465	$ 488
2	360	378	397	417	438	460	483	507	532	559	587
3	450	473	497	522	548	575	604	634	666	699	734
4	480	504	529	555	583	612	643	675	709	744	781
5	540	567	595	625	656	689	723	759	797	837	879
6	570	599	629	660	693	728	764	802	842	884	928
7	600	630	662	695	730	767	805	845	887	931	978
8	660	695	730	767	805	845	887	931	978	1027	1078
9	690	725	761	799	839	881	925	971	1020	1071	1125
10	720	756	794	834	876	920	966	1014	1065	1118	1174
11	750	788	827	868	911	957	1005	1055	1108	1163	1221
12	780	819	860	903	948	995	1045	1097	1152	1210	1270
13	840	882	926	972	1021	1072	1126	1182	1241	1303	1368
14	900	945	992	1042	1094	1149	1206	1266	1329	1395	1465
15	1050	1103	1158	1216	1277	1341	1408	1478	1552	1630	1712
16	1200	1260	1323	1389	1458	1531	1608	1688	1772	1861	1954
17	1350	1418	1489	1563	1641	1723	1809	1899	1994	2094	2199
18	1500	1575	1654	1737	1824	1915	2011	2112	2218	2329	2445

Each individual will move to the step in this schedule immediately above the monthly rate received in 1970–1971 and shall advance thereafter one additional step with each added year of experience until the maximum is attained.

(c) The position descriptions, required preparation and education, and number of monthly payments authorized for each position under the Texas State Public Education Compensation Plan are as follows:

Pay Grade	No. Mos. Paid	Class Title	Description of Positions Assigned to Class Title	Required Preparation and Education
1	10	Aide I	Assist teacher by duplicating materials; performing clerical operations; supervising students in routine drills or in P.T. drills or lunchroom supervision.	Some high school, community ties.
			Assist in office procedures at file clerk level.	High school graduate.
2	10	Aide II	Assist teacher in class drill exercises, in spotting student problems or problem students; perform functions of Aide I, as needed.	High school graduate.
			Perform stenographic, bookkeeping, and other clerical functions.	High school graduate and business college training.
3	10	Aide III	Relieve teacher of most routine drill of students; work in team teaching productively. Perform as an "Assistant Teacher" under direction of qualified teacher.	2 years college or experience equivalent.
			Perform secretarial, high-level receptionist, junior accounting, personnel assistant, campus principal secretary, etc.	2 years college plus business training.
4	10	*Teacher Trainee I	Emergency Permit Teacher without degree, but with personal traits needed to function in the classroom. Teaches students under frequent supervisory check by principal, grade-level or department head.	Minimum 2 years college, normally no less than 3 years college.
5	10	*Teacher Trainee II	Emergency Permit Teacher with college degree but deficiencies in educational preparation in professional or academic background. Teaches students under frequent supervisory check by principal, grade-level or department head.	College degree but certain educational deficiencies.
5	10	*Certified Non-degree Teacher	Teach at grade level or in teaching field for which prepared, under general supervision only.	Fully certified as teacher, but no college degree.

*These positions are presently authorized under the Minimum Foundation Pro-

Pay Grade	No. Mos. Paid	Class Title	Description of Positions Assigned to Class Title	Required Preparation and Education
6	10	* Nurse, R.N.	School nurse *without degree.*	R.N. (only)
7	10	* Teacher, B.A.	Teach at grade level or in teaching field for which prepared, under general supervision only.	Degree, no deficiency in professional education or in teaching field. Fully certified.
7	10	* Vocational Trades and Industries Teacher	Teach in an approved vocational trades and industries program.	Approved by State Board of Vocational Education.
7	10 11 12	* Vocational Teachers	Teach in approved vocational program.	Bachelor's degree; certified.
7	10	* Librarian I	Supervise school library or function as one of several librarians on a major campus.	Degree; certified.
7	10	* Visiting Teacher I	Works on personal, educational, family, and community problems with children, parents, school personnel, and community agencies.	Degree; certified.
7	10	* Nurse, B.A.	School nurse.	Degree; certified.
8	10	* Teacher, M.A.	Teach at grade level or in teaching field for which prepared, under general supervision only.	Master's degree; fully certified.
8	10 11 12	* Vocational Teacher	Teach in approved vocational program.	Master's degree; certified.
8	10	*Librarian II	Supervise school library or function as one of several librarians on a major campus.	Master's degree; fully certified.
8	10	* Physician	Serve as school physician.	M.D. degree.
8	10	* Visiting Teacher II	Works on personal, educational, family, and community problems with children, parents, school personnel, and community agencies.	Master's degree; certified.

* These positions are presently authorized under the Minimum Foundation Program.

Pay Grade	No. Mos. Paid	Class Title	Description of Positions Assigned to Class Title	Required Preparation and Education
9	10	Special Duty Teacher	Teach regular load at grade level or in teaching field for which prepared, under general supervision only, and perform special duty as sponsor of major student program; serve as cooperating teacher for student teacher; direct after-hour recreation or "lighted library"; serve as team leader in team teaching; direct band or major music group; serve as coach or assistant coach.	Fully certified as teacher and special training for special duty assignment and holder of master's degree.
10	10	* Counselor I	Provide educational and vocational guidance to students with limited personal guidance.	Fully certified.
10	10	* Supervisor I	Provide consultant services to teachers in a grade level or adjacent grades or in a teaching field or group of related fields.	Fully certified.
10	10	* Instructional Officer I	Serve as part-time principal on campus with 19 or fewer teachers.	Certified as administrator.
10	10	Administrative Officer I	Serve as principal functional assistant to superintendent in system of 5,000 ADA or less.	College degree with major or minor in assignment.
11	10	* Instructional Officer II	Serve as part-time principal on campus with 20 or more teachers.	Certified as administrator.
11	10	Administrative Officer II	Serve as principal functional assistant to superintendent in system of 5,001–12,500 ADA.	Same as Administrative Officer I plus experience in function.
12	10	Teacher Leader	(1) as grade-level head, department head, coordinate work of minimum of five teachers; or (2) as director of learning or resource center provide instructional leadership to minimum of 10 classroom teachers.	Fully certified as teacher; usually would have special training in assignment.
12	11	* Instructional Officer III	Serve as full-time principal on campus with 19 or fewer teachers.	Fully certified as administrator.
12	10	Administrative Officer III	Direct major administrative activity in a system of 12,501–25,000 ADA.	Same as Administrative Officer I plus minimum 2 years' related experience.

*These positions are presently authorized under the Minimum Foundation Program.

Pay Grade	No. Mos. Paid	Class Title	Description of Positions Assigned to Class Title	Required Preparation and Education
13	11	* Instructional Officer IV	Serve as full-time principal on campus with 20–49 teachers.	Fully certified as administrator.
13	11	Instructional Officer IV	Serve in a system of 12,501–25,000 ADA under an assistant superintendent as key specialist for major instructional program.	Fully certified as administrator or in suitable speciality.
13	12	Administrative Officer IV	Serve in capacity comparable to Instructional Officer IV above.	Same as Administrative Officer I plus 3 years' experience in function.
14	11	* Instructional Officer V	Serve as full-time principal on campus with 50–99 teachers.	Fully certified as administrator.
14	12	* Instructional Officer V	Serve as full-time principal on campus with 100 or more teachers.	Fully certified as administrator.
14	12	* Administrative Officer V	Serve as superintendent of system of 3,000 ADA or less.	Fully certified as administrator.
14	12	Instructional/Administrative Officer V	(1) Serve as assistant superintendent in system of 12,501–25,000 ADA or one of several in larger system; (2) serve in system of 25,001–50,000 ADA to direct (under an assistant superintendent) major instructional function.	Fully certified as administrator or in speciality.
14	12	Administrative Officer V	Serve in administrative capacity of comparable level as above in personnel, business, accounting, planning, research, etc.	Same as Administrative Officer I plus 5 years' related experience.
15	12	* Administrative Officer VI	Serve as superintendent in system of 3,001–5,000 ADA.	Fully certified as administrator.
15	12	Instructional/Administrative Officer VI	Serve as assistant superintendent or high-level director for major program (such as instruction, business manager, personnel director, research, planning) in system of 25,001–50,000 ADA.	Fully certified as administrator or in speciality.
16	12	* Administrative Officer VII	Serve as superintendent in system of 5,001–12,500 ADA.	Fully certified as administrator.
16	12	Instructional/Administrative Officer VII	Serve as assistant superintendent or equivalent status, coordinating group of major functions in system of more than 50,000 ADA.	Fully certified as administrator or in speciality.

* These positions are presently authorized under the Minimum Foundation Program.

Pay Grade	No. Mos. Paid	Class Title	Description of Positions Assigned to Class Title	Required Preparation and Education
17	12	*Administrative Officer VIII	Serve as superintendent in system of 12,501–50,000 ADA.	Fully certified as administrator.
18	12	*Administrative Officer IX	Serve as superintendent in system of more than 50,000 ADA.	Fully certified as administrator.

*These positions are presently authorized under the Minimum Foundation Program.

§ 16.313. Promotions, Demotions, Etc.

The commissioner of education shall develop policies, subject to approval by the State Board of Education, to provide proper salary adjustments for promotions and demotions within grades provided in the compensation schedule, and for moving experienced teachers into the schedule who were not employed in 1969–1970 or 1970–1971.

§ 16.314. Increases in 1974 and 1978

To the salary of each person employed under the Texas Public Education Compensation Schedule as printed in Section 16.312(b) of this code there shall be added $60 per month effective September 1, 1974, and continuing thereafter. An additional $66 per month shall be added effective September 1, 1978, and continuing thereafter to each salary provided under the Compensation Schedule as adjusted in 1974.

§ 16.315. Teacher Aides

Effective for the school year 1970–1971 and for each school year thereafter, there shall be provided one teacher aide for each 20 classroom teacher units earned by a school district. For the school year 1970–1971, an aide shall be paid a monthly salary of $300 and shall receive such salary for 10 months. For 1971–1972 and thereafter, the salary shall conform to the schedule provided for an Aide I in the Texas State Public Education Compensation Plan.

§ 16.316. Certified Teachers Holding Law Degree

Beginning with the school year 1967–1968, any person certified to teach in the public schools of Texas who holds a bachelor of laws or doctor of jurisprudence degree from an accredited law school shall have his minimum salary calculated on the basis of a master's degree.

[Sections 16.317 to 16.44 reserved for expansion]

SUBCHAPTER E. CURRENT OPERATING COST

§ 16.45. Current Operating Cost

The total current operating cost for each school district, other than professional salaries and transportation, shall be determined by multiplying the number of approved classroom teacher units, exceptional children teacher units, and vocational teacher units by $660, and grants therefor shall be allotted.

Amended by Acts 1971, 62nd Leg., p. 1507, ch. 405, § 28, eff. May 26, 1971.

[Sections 16.46 to 16.50 reserved for expansion]

SUBCHAPTER F. TRANSPORTATION SERVICES

§ 16.51. Transportation Services

Transportation services shall be provided and allotments therefor shall be determined according to the provisions of this subchapter.

§ 16.52. Public School Transportation System

(a) The county school boards of the several counties of this state, subject to approval by the state commissioner of education, are authorized to establish and operate an economical public school transportation system within their respective counties.

(b) In establishing and operating such transportation systems, the county school boards shall:

(1) requisition buses and supplies from the state board of control as provided for in this subchapter;

(2) prior to June 1 of each year, with the commissioner's approval, establish school bus routes within their respective counties for the succeeding school year;

(3) employ school bus drivers; and

(4) be responsible for the maintenance and operation of school buses.

§ 16.53. County and District Transportation Funds

(a) State warrants for transportation, payable to the county school transportation fund in each county, shall be for the total amount of transportation funds for which the county is eligible under the provisions of this subchapter.

(b) When requested by the board of trustees of an independent school district, the county school board shall authorize such independent district to:

(1) employ its school bus drivers;

(2) be responsible for the maintenance and operation of its school buses; and

(3) receive transportation payments directly from the state.

(c) When the county superintendent reports such authorization to the state commissioner of education, state warrants for transportation funds for which the district is eligible shall be made payable to the district transportation fund, which is hereby created.

§ 16.54. Use of Buses for Extracurricular Activities, Etc.

The county school boards and the state commissioner of education shall promulgate regulations in regard to the use of school buses, for other than transporting eligible children to and from school. Under rules and regulations of the State Board of Education, the appropriate district allocation in the county transportation fund, when approved by the county school board, or the district transportation fund, when approved by the board of trustees of the independent school district operating its own transportation system, may be used for school bus transportation of its pupils and necessary personnel on extracurricular activities and field trips sponsored by the respective district.

§ 16.55. Approved School Bus Routes

School buses shall be operated to and from school upon approved school bus routes and no variations shall be made therefrom. The penalty for varying from authorized routes and for unauthorized use of buses shall be the withholding of transportation funds from the offending county or school district. In the event the violation is committed by a district which receives no Foundation School Program Funds, the penalty provisions of Section 4.18 of this code shall be applied.

§ 16.56. Calculation of Allotment

(a) The total annual regular transportation cost allotment for each district or county shall be based upon the rules and formulas of this section.

(b) A typical bus route is defined as being from 45 to 55 miles of daily travel and composed of 60 percent surfaced roads and 40 per-

cent dirt roads, over which 15 or more pupils who live two or more miles from school are transported.

(c) Allowable total base costs of maintenance, operations, salaries, depreciation, etc., for each bus shall be:

72 capacity bus	$3,276 per year
60–71 capacity bus	3,156 per year
49–59 capacity bus	3,036 per year
42–48 capacity bus	2,916 per year
30–41 capacity bus	2,796 per year
20–29 capacity bus	2,676 per year
15–19 capacity bus	2,196 per year

(d) The capacity of a bus means the number of eligible children being transported who live two or more miles from school along the approved route served by the bus. A bus that makes two or more routes or serves two or more schools shall be considered as having a capacity equal to the largest number of eligible children on the bus at any one time.

(e) For each one percent increase of dirt road above 40 percent, one-half of one percent shall be added to the allowable total cost.

(f) For each five miles (or major fraction thereof) increase in daily bus travel above 55 miles, one percent shall be added to the total cost of operation. For each five miles (or major fraction thereof) less than 45 miles daily travel, one percent shall be deducted from the total cost of operation.

(g) The state commissioner of education may grant not to exceed $75 per pupil per year for private or commercial transportation for eligible pupils from isolated areas. The need for this type of transportation grant shall be determined on an individual basis and the amount granted shall not exceed the actual cost. Such grants shall be made only in extreme hardship cases, and no such grants shall be made if the pupils live within two miles of an approved school bus route or city public transportation service.

Subsec. (c) amended by Acts 1971, 62nd Leg., p. 1508, ch. 405, § 30, eff. May 26, 1971.

§ 16.57. Routes and Systems: Evaluation and Approval

(a) All bus routes and transportation systems shall be reviewed by the state commissioner of education and he shall be responsible for establishing criteria for evaluating the several transportation systems of this state, but all such criteria shall be subject to approval by the State Board of Education.

(b) The commissioner shall evaluate all transportation systems as rapidly as possible.

(c) No new bus routes or extensions shall be approved prior to the survey of the transportation system of the district or county requesting them.

(d) Repealed by Acts 1971, 62nd Leg., p. 1162, ch. 267, § 1, eff. May 19, 1971.

(e) Extension of a city's boundaries for city purposes only, after June 8, 1949, so as to include within the city boundaries part of a school district into which public transportation lines or facilities are then operated shall not affect the district's eligibility for transportation aid. Rather, all such districts shall be entitled to receive transportation aid under the provisions of this chapter, if otherwise qualified, to the same extent as if no part thereof had been annexed by the city and its public transportation lines had not operated therein.

(f) In approving a transportation system for a district or county, consideration shall be given to providing transportation for only those pupils who live two or more miles from the school they attend, but no consideration shall be given to providing transportation for pupils transferred from one district to another when their grades are taught in their home district unless transferred as provided by law and transportation has been approved by the county school board as provided by law.

(g) There shall be no duplication of bus routes and services within bending districts by buses operated by two school districts and/or counties except upon approval by the state commissioner of education.

§ 16.58. Use of Transportation Funds for Other Purposes

No funds paid to the several transportation units for the operation of transportation systems in this state shall be expended for any other purpose.

§ 16.59. Rules of Commissioner

The Commissioner of Education shall formulate rules and regulations, subject to approval by the State Board of Education for enforcing the provisions of this subchapter.

§ 16.60. Appeals

Appeals to the commissioner of education and to the State Board of Education may be had from policy decisions of the county school boards affecting transportation.

§ 16.61. Purchase of Vehicles

(a) Motor vehicles used for the purpose of transporting school children, including school buses, their chassis and/or bodies purchased through the state board of control, shall be paid for by the state board of control as set out in applicable laws. The Legislature may appropriate out of any money in the state treasury not otherwise appropriated a sum not exceeding $250,000, or so much thereof as necessary, for the state board of control to be used for such purposes.

(b) Any such sum appropriated shall be known as the school bus revolving fund. When motor vehicles and school buses are delivered to the various schools coming within the provisions of this chapter, the governing bodies of such schools shall reimburse the state board of control for the money expended for such school buses including their chassis and/or bodies and the money shall be deposited by the state board of control in the school bus revolving fund.

§ 16.62. Transportation Allotment for Exceptional Children Program

(a) An annual transportation cost allotment for each district operating an approved exceptional children program shall be computed and paid from the Foundation School Program Fund on a per capita basis as provided by this section.

(b) For physically and/or orthopedically handicapped children, visually handicapped children with conditions making impractical the use of public transportation, deaf children, trainable mentally retarded children, and/or educable mentally retarded children, the transportation allotment shall be $150 per exceptional child receiving such transportation, providing the district locally determines and certifies subject to the approval of the state commissioner of education that the pupil:

(1) is unable to utilize existing regular transportation services; and

(2) would be unable to attend the exceptional children class unless such special transportation is provided.

(c) Allotments granted under this section shall be:

(1) used only for transportation purposes of children enrolled in a district-operated exceptional children program;

(2) deposited in the district's exceptional transportation fund; and

(3) accounted for separately from regular transportation funds.

Subsec. (b) amended by Acts 1971, 62nd Leg., p. 1494, ch. 405, § 20, eff. May 26, 1971.

§ 16.63. Contract With Public Transportation Company

(a) As an alternative to maintaining and operating a complete public school transportation system under this subchapter, and if the respective governing board is able to obtain an economically advantageous contract, a county school board for its transportation system or a board of trustees of an independent school district which has been authorized to be responsible for the maintenance and operation of its school buses may contract with public transportation companies for all or any part of its public school transportation.

(b) A contract is economically advantageous if the cost of the service contracted for is less than the projected cost of the same service as otherwise provided in this subchapter.

(c) The state commissioner of education, subject to the approval of the State Board of Education, shall make rules for the administration of this section.

(d) Contracts for public school transportation may include provisions for transporting students to and from approved school activities.

(e) Upon approval of the contract by the State Board of Education, the contract price for the service shall be included in the annual transportation cost allotment for the respective county or district.

[Sections 16.64 to 16.70 reserved for expansion]

SUBCHAPTER G. FINANCING THE PROGRAM

§ 16.71. Financing—General Rule

The sum of the approved salaries for professional positions, the current operating cost other than professional salaries and transportation, and cost of transportation service of each district, computed and determined in accordance with the provisions of this chapter, shall constitute the total cost of the Foundation School Program, which program shall be financed by:

(1) an equalized, local school district effort to the extent hereafter provided for the support of this program;

(2) distribution of the state and county available school funds based on the number of scholastics; and

(3) allocation to each local district a sum of state money appropriated for the purposes of public school education and sufficient to finance the remaining costs of the Foundation School Program in that district, which sum shall be computed and determined in accordance with the provisions of this subchapter.

§ 16.711. Committee to Study Financing of Program

(a) There is hereby established a committee to be comprised of 18 members: Six to be appointed by the governor, six by the lieutenant governor, and six by the speaker of the house. Three members appointed by the lieutenant governor shall be members of the senate and three members appointed by the speaker of the house shall be members of the house of representatives. The committee members shall serve from the date of their respective appointments until August 31, 1971. Members of the committee shall serve without compensation but each shall receive reimbursement for actual travel expense when on official business of the committee.

(b) The governor shall call the first meeting of the committee immediately after a majority of the members have accepted appointment and at that time the members shall elect a chairman and a vice chairman from among their number and adopt procedural rules governing membership and committee conduct.

(c) The committee may create advisory committees to perform officially and effectively the duties and responsibilities imposed by this section.

(d) A majority of the committee shall constitute a quorum.

(e) The committee shall have the responsibility of studying the relationship between the state and local school districts in financing the Minimum Foundation Program. They shall examine the structure of the economic index now in operation, ascertaining its weaknesses and its strengths. It shall review the findings of the Governor's Committee on Public School Education and evaluate information available relative to the financing of the Minimum Foundation Program. They shall explore all facets and all possibilities in relation to this problem area and shall recommend to a called session of the legislature or to the 62nd Legislature convening in 1971 a specific formula or formulae to establish a fair and equitable basis for the division of the financial responsibility between the state and the various local school districts of Texas.

(f) There is hereby appropriated from the General Revenue Fund for the fiscal year ending August 31, 1970, the sum of $25,000 to pay the expenses of the committee. Any unexpended balance of the original appropriation of $25,000 is hereby reappropriated to carry out the work of the committee during the fiscal year beginning September 1, 1970.

(g) The State Board of Education and the committee shall coordinate their efforts and the State Board of Education shall cooperate with the committee and shall furnish professional, technical, and clerical staff when deemed necessary to implement the work of the

committee. Every state agency, department, and institution, and every state, county, and school district official is directed to provide such information as may be requested by the committee and to assist the committee in accomplishing its objective.

(h) The committee shall report the results of its studies and make recommendations to the governor and to each member of the legislature not later than August 31, 1970. Because of the serious problem which exists in the financing of the Minimum Foundation Program and of apparent inequities in the allocation of funds to be provided by local school districts, the committee is encouraged to complete its work at the earliest possible date so that a solution might be found to be made applicable to the 1970–1971 school year.

Added by Acts 1971, 62nd Leg., p. 1509, ch. 405, § 33, eff. May 26, 1971.

§ 16.72. Total Amount Chargeable to Districts

(a) The sum of the amounts to be charged for the 1969–1970 school year against the local school districts of the state toward the Foundation School Program shall be $180,800,000, to which shall be added by the State Board of Education at its July meeting in 1969, 20 percent of the estimated increased cost of the Foundation Program authorized by Acts of the 61st Legislature amending the Foundation School Program.

(b) The sum of the amounts to be charged for the 1970–1971 school year against the local school districts of the state toward the Foundation School Program shall be $204,900,000, to which shall be added by the State Board of Education at its March meeting in 1970, 20 percent of the estimated increased cost of the Foundation Program authorized by Acts of the 61st Legislature amending the Foundation School Program.

(c) For the 1971–1972 school year, and for each school year thereafter, the sum of the amounts to be charged against the local school districts of the state toward the Foundation School Program shall be 20 percent of the estimated total cost of the Foundation School Program for the immediately preceding school year, plus an amount equal to the difference between the gross local fund assignment and the net local fund assignment for the immediately preceding school year.

Amended by Acts 1971, 62nd Leg., p. 1508, ch. 405, § 31, eff. May 26, 1971.

§ 16.73. Estimate of Total Cost of Program; Local Assignment

At its regular meeting in March, 1971, and at each regular meeting in March thereafter, the State Board of Education, after receiving the

recommendation of the state commissioner of education, shall estimate the total cost of the Foundation School Program for the then current school year, based upon laws and approved school budgets in effect on the date when such estimate is made. Within 30 days after such estimate has been made, the state commissioner of education, subject to the approval of the State Board of Education, shall assign to each school district, according to its taxpaying ability as determined in this subchapter, its proportionate part of such total to be raised locally for the next school year and applied towards the financing of its Minimum Foundation School Program.

Amended by Acts 1971, 62nd Leg., p. 1509, ch. 405, § 31, eff. May 26, 1971.

§ 16.74. County Economic Index

(a) The state commissioner of education, subject to approval by the State Board of Education shall, not later than the first week in March of each year, calculate an economic index of the financial ability of each county to support the Foundation School Program. This index shall be calculated to approximate each county's percentage of statewide taxpaying ability and shall constitute for the purpose of this subchapter a measure of that county's ability, in relation to that of other counties in the state, to support schools.

(b) The economic index for each county shall be based upon and determined by the following weighted factors:

(1) assessed property valuation of the county, weighted by twenty;

(2) scholastic population of the county, weighted by eight; and

(3) income for the county as measured by value added by manufacture, value of minerals produced, value of agricultural products, payrolls for retail establishments, payrolls for wholesale establishments, and payrolls for service establishments, all weighted collectively by seventy-two.

(c) The commissioner of education, subject to approval by the State Board of Education, shall annually recompute not later than the first week in March, a new economic index using an average of data for a three-year period which shall be taken from the most recently available official publications and reports of state and federal agencies.

§ 16.741. Livestock Sales From Feedlots

(a) In calculating an economic index of the financial ability of each county to support the Foundation School Program pursuant to Section

16.74 of this code, the commissioner of education shall calculate the value of cattle or other animal sales from feedlots at the net increase in value while in the feedlot.

(b) The "net increase in value in a feedlot" is arrived at by using the latest three years' average of the Federal Reserve Bank's interest rate as of January 1 of each year to which is added one and one-half percentage points. This total interest rate percentage figure then multiplied by the average sale value of cattle or other animals from the feedlot, will result in the net increase in value while in a feedlot, and is the figure that shall be used to carry out the purposes of this section.

Added by Acts 1971, 62nd Leg., p. 1494, ch. 405, § 21, eff. May 26, 1971.

§ 16.75. County Assignment

For the school year beginning 1971–1972 and each school year thereafter, the state commissioner of education shall calculate and determine the total sum of local funds that the school districts of a county shall be assigned to contribute toward the total cost of the Foundation School Program by multiplying 20 percent of the estimated Foundation Program cost for the immediately preceding school year, plus an amount equal to the difference between the gross local fund assignment and the net local fund assignment for the immediately preceding school year, as determined under the provisions of this subchapter by the economic index determined for each county. The product shall be regarded as the local funds available in each respective county toward the support of the Foundation School Program and shall be used in calculating the portion of said amount which shall be assigned to each school district in the county.

Amended by Acts 1971, 62nd Leg., p. 1509, ch. 405, § 32, eff. May 26, 1971.

§ 16.76. School District Assignment

(a) The amount of local funds to be charged to each school district and used therein for support of the Foundation School Program shall be calculated and determined by the state commissioner of education as follows: Divide the state and county assessed valuation of all property in the county subject to school district taxation for the next preceding school year into state and county assessed valuation of the district for the next preceding school year, finding the district's percentage of the county valuation. Multiply the district's percentage of the county valuation by the amount of funds assigned to all of the districts in the county. The product shall be the amount of local funds

that the district shall be assigned to raise toward the financing of its Foundation School Program.

(b) In any district containing state university-owned land, state-owned prison land, land in one or more parcels comprising a total area in excess of 7,000 acres used for municipal cooling lakes in the generation of electricity in counties having a population of more than 700,000 according to the last preceding federal census, federal-owned forestry land, federal owned reservoirs, federal-owned recreation areas, federal-owned military reservations, or federal-owned Indian reservations, the amount assigned to a school district shall be reduced in the proportion that the area included in the above named classification bears to the total area of the district. For purposes hereof, state university owned land is defined to mean and include also state owned land located in Brazos County and devoted to the use of Texas A&M University and land owned by East Texas State University in Hunt County and land owned by Pan American University.

(c) No local fund assignment shall be charged to the Boy's Ranch Independent School District in Oldham County, the Bexar County School for Boys Independent School District in Bexar County, or the Bexar County School for Girls Independent School District in Bexar County.

(d) Beginning with the school year 1967–1968, and thereafter, in any school district having three percent or more of its total scholastic population for the preceding school year composed of scholastic residents and transfers of tax-exempt institutions for orphan, dependent, and/or neglected children, the amount assigned to such a district shall be reduced for the current school year by an amount equal to the product of the total average daily attendance of students who were residents and/or transfers of such tax exempt institutions during the preceding school year multiplied by $151.50. The superintendent of any district desiring to receive such a reduction in assignment and qualifying therefor shall certify to the Central Education Agency, not later than December 1 of each year, the following information:

(1) the total average daily attendance of the school district determined for students residing in the district for the preceding school year;

(2) the average daily attendance for the preceding school year determined for the scholastic residents of the tax exempt institutions for orphan, dependent, and/or neglected children; and

(3) a list showing the name of each such institution scholastic, the total daily attendance earned for such students in the preceding school year, and the name and address of the institution.

(e) If the revenue that would be derived from the legal maximum local maintenance school tax is less than the amount assigned to a

school district according to its economic index, and if the district's property valuation is not less than the same property's valuation for state and county purposes, the lesser amount shall be assigned to be raised by such school district.

(f) Failure of a school district to collect local maintenance school funds equal to its assigned amount will not make the district ineligible for full state per capita apportionment and full foundation school fund grants, but the assigned amount shall be charged against the district as budgetary receipts whether or not actually collected.

(g) The amount of local funds assigned to a contract district, as provided for in Section 16.11(i) of this code, shall be assigned to the receiving district and all local taxes, except those required for the interest and sinking fund, shall be credited as collected to the receiving school district.

(h) If a district other than a contract district has no school, the amount of local funds assigned to, and local taxes collected from, such district shall be transferred for the current year to the receiving district in which such children attend school. But if its pupils attend schools in more than one receiving district, local fund assignments and local taxes shall be apportioned for the current year between such receiving districts according to the number of transfers to each.

(i) If any school district has a budgetary income, as provided above in Section 16.71(1) and (2) of this code, in excess of the amount needed to operate a minimum Foundation School Program and transfers pupils to another district, it shall pay to the receiving district a proportionate part of such excess, based upon the ratio of the number transferred to its enumerated scholastic population, and this excess portion shall be charged to such receiving district.

(j) The sum of the amounts assigned to the several parts of a county-line school district shall be the amount assigned to be raised by such district for financing its Foundation School Program.

Subsec. (b) amended by Acts 1971, 62nd Leg., p. 1494, ch. 405, § 22, eff. May 26, 1971; Acts 1971, 62nd Leg., p. 2408, ch. 758, § 1, eff. June 8, 1971. Subsec. (d) amended by Acts 1971, 62nd Leg., p. 1494, ch. 405, § 23, eff. May 26, 1971.

§ 16.77. Notification of Local Fund Assignment

(a) The county tax assessor-collector in each county, in addition to his other duties prescribed by law, shall certify to the state commissioner of education, not later than December 1 of each year, the following information:

(1) the assessed valuation, on a state and county valuation basis, of all property subject to school district taxation in each

school district, or portion of a school district in such county, and the total assessed valuation of all property subject to school district taxation in the county;

(2) the total area of each school district; and

(3) the area within each school district comprised of state university-owned land, state-owned prison land, federal-owned forestry land, federal-owned reservoirs, federal-owned recreation areas, federal-owned military reservations, and/or federal-owned Indian reservation.

(b) Should any county tax assessor collector fail to submit such certificates to the state commissioner of education, the state comptroller of public accounts is directed to do so, estimating when necessary.

(c) As soon after the receipt of such certificates as practicable, and prior to setting the respective tax rates for the school districts of the county, the state commissioner of education shall notify each school district of the amount of local funds that such district is assigned to raise for the succeeding school year.

(d) If there has been a marked increase or decrease in the assessed valuation of a school district within a county, and if the county school board, after certifying that the use of the preceding year's county and school district valuations for determining local fund assignments would be inequitable, recommends a different distribution of the county total than that made by the state commissioner of education, then such recommendations, subject to the commissioner's approval, shall become and be the lawful local fund assignments for such district.

Subsec. (a) amended by Acts 1971, 62nd Leg., p. 1495, ch. 405, § 24, eff. May 26, 1971.

§ 16.78. Excess of Local Funds Over Amount Assigned

Any local maintenance funds in excess of the amount assigned to a district may be expended for any lawful school purpose or carried over into the next school year.

§ 16.79. Administration of Foundation School Program

(a) It shall be the duty of the State Board of Education, State Board for Vocational Education, and the state commissioner of education to take such action, require such reports, and make such rules and regulations consistent with the terms of this chapter as may be necessary to carry out its provisions.

(b) The state commissioner of education shall determine annually:

(1) the amount of money necessary to operate a Foundation School Program in each school district;

(2) the amount of local funds to be assigned and charged to each school district; and

(3) the per capita apportionment from state and county available school funds available to each school district.

(c) The commissioner of education shall then grant to each school district from the foundation school fund appropriation the amount of funds necessary to provide the difference between subdivision (1) and the sum of subdivisions (2) and (3) of Subsection (b) of this section.

(d) The commissioner shall approve warrants to each school district equaling the amount of its grant. Warrants for all money expended according to the provisions of this chapter shall be approved and transmitted to treasurers or depositories of school districts in the same manner as warrants for state apportionment are now transmitted.

§ 16.80. Dormant School Districts

(a) The county school boards of all counties of the state are authorized and required to consolidate by order of said board each dormant school district within the county with an adjoining district or districts.

(b) The term "dormant school district" means any school district that fails for any two successive years to operate a school in the district.

(c) The governing board of the district with which a dormant school district is consolidated shall continue to be the governing board for the new district.

(d) In each case, the consolidation order of the county school board shall define by legal boundary description the territory of the new district as so enlarged and shall be recorded in the minutes of the county school board as provided by law.

(e) Elections shall be held when required by law in such consolidated districts for the assumption of outstanding bonds, if any, for the levying of taxes therefor, and for the levying of a local maintenance tax.

(f) If a county-line district is or becomes dormant, the consolidation provisions of this section shall apply to all counties affected to the extent of territory in each.

§ 16.81. Territory Not in School District

(a) All property subject to school district taxation in the state must be included within the limits of a school district and a proper and proportionate tax paid thereon for school purposes. Therefore, at any time it may be determined there is territory located in a county but not within the described limits of a school district, the county school board is authorized and required to add such territory to an adjoining district or districts.

(b) In each case, the order of consolidation shall define by legal boundary description the territory of the new district and shall be recorded in the minutes of the county school board as provided by law.

(c) Elections shall be held as provided by law in such new districts for the assumption of outstanding bonds, if any, for the levying of taxes therefor, and for the levying of a local maintenance tax.

§ 16.82. Cumulative Effect

The provisions of Section 1680 and 16.81 of this code shall not be construed to repeal, supercede or limit any existing law providing other methods for school district consolidation and annexation.

§ 16.83. Falsification of Records, Report

(a) When, in the opinion of the director of school audits of the Central Education Agency, audits or reviews of accounting, enrollment, or other records of a school district reveal deliberate falsification of such records, or violation of the provisions of this chapter, whereby the district's share of state funds allocated under authority of this chapter would be, or has been, illegally increased, said director shall promptly and fully report such fact direct to the State Board of Education and to the state auditor.

(b) In the event of overallocation of such funds, as determined by the State Board of Education or the state auditor by reference to the director's report, the Central Education Agency shall, by withholding from subsequent allocations of state funds, recover from such district an amount, or amounts, equal to the overallocation.

[Sections 16.84 to 16.860 reserved for expansion]

SUBCHAPTER G–1. FOUR–QUARTER SCHOOL YEAR

Subchapter G–1 consisting of §§ 16.861 to 16.864 was added by Acts 1971, 62nd Leg., p. 2054, ch. 632, § 1, effective August 30, 1971.

§ 16.861. Transition to Four-Quarter System; Curriculum Revision

The Central Education Agency shall prepare a reorganized curriculum based on operation of the schools on a quarter basis. The revision shall be so structured that the material covered during the present school year of two semesters is covered in three three-month quarters. The agency shall distribute this restructured curriculum to each school district in the state in sufficient time so that the new curriculum can be put into operation beginning with the 1972–1973 school year.

§ 16.862. Operation on Quarter Basis

Beginning with the 1972–1973 school year, each school district in this state may operate on the basis of a quarter system, and beginning with the 1973–1974 school year, each school district in this state shall operate on the basis of a quarter system, with the schools being in operation during at least three quarters during each school year, providing 180 days of instruction for students and 10 days of inservice education for teachers.

§ 16.863. Foundation School Program Credit

Each school district shall receive average daily attendance credit under the Foundation School Program for attendance by a student for any three quarters during any one school year.

§ 16.864. Four-Quarter Operation Authorized

(a) A school district may choose to operate all or some of its schools for all four quarters of the school year. This choice shall be approved or disapproved by the district school board in a regularly scheduled open meeting. If a district so chooses, no credit for average daily attendance under the Foundation School Program may be given to the district for attendance by any one student for more than three quarters during any one school year. Attendance by a student for his fourth quarter must be financed either by the student on a tuition basis or by the district from its own funds, at the option of the district.

(b) A district operating during all four quarters of the school year shall decide which students are to attend school during which quarters. However, schedules shall be so arranged that all members of a family attending the schools of a district may attend the same three quarters.

(c) A district operating during all four quarters of the school year may not require a teacher to teach more than three quarters plus the number of days provided by law for inservice education and preparation during any one school year. A teacher or other school employee under the Minimum Foundation Program who elects to work four quarters during a school year shall receive a minimum salary which is increased proportionately in compliance with the state compensation plan.

(d) A district operating during all four quarters of the school year may not require a student to attend more than three quarters.

[Sections 16.865 to 16.90 reserved for expansion]

SUBCHAPTER H. QUARTERLY SEMESTER PILOT PROGRAMS

Repeal

Acts 1971, 62nd Leg., p. 2054, ch. 632, § 2, provides that effective September 1, 1972, Subchapter H (§§ 16.91 to 16.95) is repealed.

§ 16.91. Pilot Program

For purpose of exploring the feasibility of operating quarterly semester pilot programs, public school districts of this state are hereby authorized to operate (in lieu of the usual nine-month program) a twelve-month school year program and to receive allocation of state aid toward financing the extended three-month operation from the Foundation Program Fund, determined in the manner prescribed in this subchapter. Provided, however, that the district shall operate such twelve-month program under its proposed plan submitted to the Central Education Agency and subject to approval of the agency as meeting policy and regulations established and adopted by the State Board of Education applicable thereto.

§ 16.92. Limitation

Quarterly semester pilot programs, annually approvable under this subchapter, shall be restricted in number to involve a maximum of 10 programs not to exceed 100,000 pupils, based on average daily attend-

ance in the preceding school year, and the attendance of eligible pupils shall be restricted to three quarterly semesters.

§ 16.93. Cost Basis

The cost of operating such approved quarterly semester pilot programs shall be borne by the state and each participating district on the same percentage basis that applies to financing the Foundation School Program Act within the respective district.

§ 16.94. Calculation of Costs

For purpose of computing authorized state aid and allocations under this subchapter, the cost of the program shall be ascertained as follows:

(1) The district's average daily attendance for classroom teacher unit eligibility and allocations shall be determined on a quarter semester basis, limiting eligible pupil attendance to three quarters within each scholastic year. Eligibility for special service teachers, supervisors and/or counselors, head teachers, part-time principals, and full-time principals shall be determined by dividing the total aggregate days of attendance in the pilot program by the number of days that instruction is offered during three semesters, determined to the best advantage of the district.

(2) An additional three-month salary adjustment, based on the state minimum salary schedule, shall be added for classroom teacher units occasioned by a twelve-month operation. Provided further that the number of months and salary, based on the state minimum salary schedule, for eligible special service teachers, supervisors and/or counselors, head teachers, part-time principals and full-time principals shall be allowed for 12 months.

(3) The total current operating costs of each pilot program as herein described, other than professional salaries and transportation, shall be determined by multiplying the number of classroom teacher units and exceptional teacher units times the number of months employed times $67.

(4) An additional transportation allotment shall be added not to exceed the amount of one-third of the transportation allotment as normally computed for a nine-month operation.

§ 16.95. State's Share of Cost

The state's share of the cost shall be paid from the Minimum Foundation Program Fund, and this cost shall be considered by the Foun-

dation Program Committee in estimating the funds needed for Foundation School Program purposes.

[Sections 16.96 to 16.970 reserved for expansion]

SUBCHAPTER H–1. THREE–SEMESTER PILOT PROGRAMS

Subchapter H–1 consisting of §§ 16.971 to 16.975 was added by Acts 1971, 62nd Leg., p. 1449, ch. 405, § 25, effective May 26, 1971. See, also the italicized note preceding § 16.01 of this chapter.

§ 16.971. Pilot Program

For the purpose of exploring the feasibility of operating three-semester pilot programs, public school districts of this state are hereby authorized to operate (in lieu of the usual 9-month program) a 12-month school year program and to receive allocation of state aid toward financing the additional 3-month operation from the Foundation Program Fund, determined in the manner prescribed in this subchapter. Provided, however, that the district shall operate such 12-month program under its proposed plan submitted to the Central Education Agency, and subject to approval of the agency as meeting policy and regulations established and adopted by the State Board of Education applicable thereto.

§ 16.972. Limitation

(a) Three-semester pilot programs, annually approvable under this subchapter, shall be restricted in number to involve a maximum of 10 programs not to exceed 100,000 pupils, based on average daily attendance in the preceding school year, and the attendance of eligible pupils shall be restricted to two semesters out of the three-semester program.

(b) For purposes only of this pilot program, any child otherwise eligible who becomes six years of age after September 1 may be admitted to public school in any following semester beginning after he has reached six years of age, and such attendance shall be counted as eligible attendance for allocation purposes of the Foundation School Program Fund.

§ 16.973. Cost Basis

The cost of operating such approved three-semester pilot programs shall be borne by the state and each participating district on the same percentage basis that applies to financing the Foundation School Program within the respective district.

§ 16.974. Calculation of Costs

For purpose of computing authorized state aid and allocations under this subchapter, the cost of the program shall be ascertained as follows:

(1) The district's average daily attendance for classroom teacher unit eligibility and allocations shall be determined on a three-semester basis, limiting eligible pupil attendance to two semesters within each scholastic year. Eligibility for special service teachers, supervisors and/or counselors, head teachers, part-time principals, and full-time principals shall be determined by dividing the total aggregate days of attendance in the pilot program by the number of days that instruction is offered during two semesters, determined to the best advantage of the district.

(2) An additional salary adjustment, based on the state minimum salary schedule, shall be added for classroom teacher units occasioned by a 12-month operation. Provided further that the number of months and salary, based on the state minimum salary schedule, for eligible special service teachers, supervisors and/or counselors, head teachers, part-time principals, and full-time principals shall be allowed for 12 months.

(3) The total current operating costs of each pilot program as herein described, other than professional salaries and transportation, shall be determined by multiplying the number of classroom teacher units and exceptional teacher units times the number of months employed times $67.

(4) An additional transportation allotment shall be added not to exceed the amount of one-third of the transportation allotment as normally computed for a nine-month operation.

§ 16.975. State's Share of Cost

The state's share of the cost shall be paid from the Minimum Foundation Program Fund, and this cost shall be considered by the Foundation Program Committee in estimating the funds needed for Foundation School Program purposes.

[Sections 16.976 to 16.979 reserved for expansion]

SUBCHAPTER I. SUPPLEMENTAL STATE SALARY AID TO SCHOOL DISTRICTS

§ 16.98. Supplemental State Salary Aid

(a) Established hereby is a program to provide supplemental state salary aid to public free school districts in addition to funds provided under any other provision of the laws or constitution of this state. Purpose of this supplementary aid program: To encourage higher salaries for classroom teachers as defined herein, of grades one through twelve.

(b) "Classroom teacher" for purposes of this program shall mean any professionally qualified teacher employed full time by a school district and spending at least one-half of his working time in actual instruction of pupils in regularly organized and scheduled classes, vocational and exceptional teachers included.

(c) Entitlement of each district for supplemental state aid authorized herein shall be determined by adding the number of classroom, vocational and exceptional teacher units allocated only to districts eligible under those provisions of foundation school program described under Sections 16.13, 16.14 and 16.16 of this code, and multiplying the sum of all such classroom teachers as herein defined by $50.

(d) A school district may establish eligibility to receive funds in the amount determined under Subsection (c) of this section by submitting to the Central Education Agency a plan which shall meet the following conditions:

(1) State funds to be utilized as salary from amount determined under Subsection (c) of this section shall constitute not more than the same percentage of the total amount disbursed as supplemental salary to classroom teachers as the state share of the foundation school program in each participating school district; and

(2) All funds received as supplemental salary aid shall be paid as supplemental salary to persons who qualify as classroom teachers and of districts as defined in above Subsections (b) and (c) of this section; and

(3) Supplemental salary paid to any such classroom teacher shall be in addition to the salary to which such teacher is entitled under the regularly established salary policy of the school district; and

(4) Not less than ten percent of such classroom teachers employed by the school district shall participate in the state-aid supplemental salary funds disbursed to any district, and no class

room teacher shall receive less than $100 or in excess of $1000 in any school year.

(e) On or before its first meeting day of each fiscal year, the State Board of Education shall certify to the comptroller of public accounts the amount of money required to meet the provisions of this salary aid program. Upon receipt of the certification or as soon thereafter as possible, the comptroller shall cause to be set aside from funds collected or to be collected and credited to the general revenue fund a sum sufficient to meet such certification, and such sum(s) as so certified are hereby appropriated therefor. Any funds remaining unexpended and unencumbered in this salary program account on the last working day of each fiscal year shall be credited to the general revenue fund.

CHAPTER 20. SCHOOL DISTRICT FUNDS

SUBCHAPTER A. SCHOOL DISTRICT TAX BONDS AND MAINTENANCE TAXES

Section

20.01. Bonds and Bond Taxes.
20.02. Maintenance Taxes.
20.03. Assessment of Property.
20.04. Bond and Tax Elections.
20.05. Refunding Bonds.
20.06. Examination of Bonds by the Attorney General.
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[Sections 20.09 to 20.20 reserved for expansion]

SUBCHAPTER B. SCHOOL DISTRICT REVENUE BONDS

20.21. Gymnasia, Stadia, and Other Recreational Facilities.
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[Sections 20.28 to 20.40 reserved for expansion]

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SUBCHAPTER A. SCHOOL DISTRICT TAX BONDS AND MAINTENANCE TAXES

Section 20.01. Bonds and Bond Taxes

The governing board of each independent school district (including, as to each municipally controlled independent school district, the city council or commission which has jurisdiction thereof), and the governing board of each rural high school district, and the commissioners court of every county, for and on behalf of each common school district under its jurisdiction, shall be authorized to issue negotiable coupon bonds for the construction and equipment of school buildings in the district and the purchase of the necessary sites therefor, and to levy and pledge, and cause to be assessed and collected, annual ad valorem taxes sufficient to pay the principal of and interest on said bonds as the same come due, subject to the provisions and restrictions of Section 20.04 of this code. Such bonds may be issued in various series or issues, and shall mature serially or otherwise not more than 40 years from their date, and shall bear interest at such rate or rates as shall be determined within the discretion of such governing board or commissioners court. Said bonds, and the interest coupons appertaining thereto, shall be negotiable instruments, and they may be made redeemable prior to maturity, and may be issued in such form, denominations, and manner, and under such terms, conditions, and details, and shall be signed and executed, as provided by such governing board or commissioners court in the resolution or order authorizing the issuance of said bonds. All bonds shall be sold to the highest bidder for not less than their par value and accrued interest.

§ 20.02. Maintenance Taxes

The governing board of each independent school district (including, as to each municipally controlled independent school district, the city council or commission which has jurisdiction thereof), and the governing board of each rural high school district, and the commissioners court of every county, for and on behalf of each common school district under its jurisdiction, shall be authorized to levy, and cause to be assessed and collected, annual ad valorem taxes for the further maintenance of public free schools in the district, subject to the provisions and restrictions of Section 20.04 of this code.

§ 20.03. Assessment of Property

In common school districts the value of taxable property shall be assessed on the same basis as that used for state and county purposes;

but in all other school districts such value may be assessed on any basis authorized or permitted by any applicable law.

§ 20.04. Bond and Tax Elections

(a) No such bonds shall be issued and none of the aforesaid taxes shall be levied unless authorized by a majority of the resident, qualified electors of the district, who own taxable property therein and who have duly rendered the same for taxation, voting at an election held for such purpose, at the expense of the district, in accordance with the Texas Election Code, except as hereinafter provided. Each such election shall be called by resolution or order of such governing board or commissioners court, which shall set forth the date of the election, the proposition or propositions to be submitted and voted on, the polling place or places, and any other matters deemed necessary or advisable by such governing board or commissioners court.

(b) In each proposition submitted to authorize the issuance of bonds there shall be included the question of whether the governing board or commissioners court shall be authorized to levy and pledge, and cause to be assessed and collected, annual ad valorem taxes, on all taxable property in the district, either—

(1) sufficient, without limit as to rate or amount, to pay the principal of and interest on said bonds; or

(2) sufficient to pay the principal of and interest on said bonds, provided that the annual aggregate bond taxes in the district shall never be more than the rate (not to exceed $1 on the $100 valuation of taxable property in the district) stated in said proposition.

(c) If bonds are ever voted in a district pursuant to Subsection (b)(1) of this section, then all bonds thereafter proposed shall be submitted pursuant to that subsection, and Subsection (b)(2) of this section shall not be applicable to such district. No bonds shall be issued pursuant to Subsection (b)(1) of this section if the aggregate principal amount of tax bond indebtedness of the district after such issuance would be in excess of 10 percent of the assessed valuation of taxable property in the district according to the then last completed and approved ad valorem tax rolls of the district.

(d) In each proposition submitted to authorize the levy of maintenance taxes there shall be included the question of whether the governing board or commissioners court shall be authorized to levy, and cause to be assessed and collected, annual ad valorem taxes, for the further maintenance of public free schools, of not to exceed the rate (which shall be not more than $1.50 on the $100 valuation of taxable property in the district) stated in said proposition.

(e) Notice of each such election shall be given by publishing a substantial copy of the election resolution or order one time, at least 10 days prior to the date set for the election, in a newspaper of general circulation in the district. Such governing board or commissioners court shall canvass the returns and declare the results of such elections.

§ 20.05. Refunding Bonds

Each such governing board or commissioners court shall be authorized to refund or refinance all or any part of any of the district's outstanding bonds and matured but unpaid interest coupons payable from ad valorem taxes by the issuance of negotiable, coupon, refunding bonds payable from ad valorem taxes. Said refunding bonds shall mature serially or otherwise not more than forty years from their date, and shall bear interest at such rate or rates, as shall be determined within the discretion of such governing board or commissioners court. Said refunding bonds may be issued without an election in connection therewith, provided that in no event shall any series or issue of refunding bonds be issued in a principal amount greater than the face or par value of the obligations being refunded thereby, and provided that if a maximum interest rate was voted for the bonds being refunded, the refunding bonds shall not bear interest at a rate higher than such voted maximum rate, and provided further that refunding bonds shall be payable from taxes of the same nature as those pledged to the payment of the obligations being refunded thereby. Said refunding bonds, and the interest coupons appurtenant thereto, shall be negotiable instruments and they may be made redeemable prior to maturity, and may be issued in such form, denomination, and manner, and under such terms, conditions and details, and shall be signed and executed, as provided by the governing board or the commissioners court in the resolution or order authorizing the issuance of said refunding bonds. The refunding bonds shall be issued and delivered in lieu of, and upon surrender to the comptroller of public accounts of Texas and cancellation of, the obligations being refunded thereby, and the comptroller of public accounts shall register the refunding bonds and deliver the same in accordance with the provisions of the resolution or order authorizing the refunding bonds. Such refunding may be accomplished in one or in several installment deliveries. Said refunding bonds also may be issued and delivered in accordance with the provisions of and procedures authorized by any other applicable law.

§ 20.06. Examination of Bonds by the Attorney General

All bonds issued pursuant to this subchapter, and the appropriate proceedings authorizing their issuance, shall be submitted to the at-

torney general of Texas for examination. If he finds that such bonds have been authorized in accordance with law he shall approve them, and thereupon they shall be registered by the comptroller of public accounts of the State of Texas; and after such approval and registration such bonds shall be incontestable in any court, or other forum, for any reason, and shall be valid and binding obligations in accordance with their terms for all purposes.

§ 20.07. Bonds are Legal Investments

All bonds issued pursuant to this subchapter shall be legal and authorized investments for all banks, trust companies, building and loan associations, savings and loan associations, small business investment corporations, insurance companies of all kinds and types, fiduciaries, trustees, and guardians, and for all interest and sinking funds and other public funds of the State of Texas and all agencies, subdivisions, and instrumentalities thereof, including all counties, cities, towns, villages, school districts, and all other kinds and types of districts, public agencies and bodies politic. Said bonds also shall be eligible and lawful security for all deposits of public funds of the State of Texas and all agencies, subdivisions, and instrumentalities thereof, including all counties, cities, towns, villages, school districts, and all other kinds and types of districts, public agencies, and bodies politic, to the extent of the market value of said bonds, when accompanied by any unmatured interest coupons appurtenant thereto.

§ 20.08. Previously Voted Bonds and Taxes

All tax bonds voted in any school district in accordance with law but unissued at the effective date of this code may be issued in the manner provided by the law in effect at the time such bonds were voted, or issued in the manner provided in this subchapter, to the extent pertinent and applicable, without an additional election; and all maintenance taxes heretofore voted in any school district in accordance with law may be levied and collected in the manner provided by the law in effect at the time such bonds were voted, or issued in the manner provided in this subchapter, to the extent pertinent and applicable, without an additional election.

[Sections 20.09 to 20.20 reserved for expansion]

SUBCHAPTER B. SCHOOL DISTRICT REVENUE BONDS

§ 20.21. Gymnasia, Stadia, and Other Recreational Facilities

The governing board of each independent school district (including, as to each municipally controlled independent school district, the city

council or commission which has jurisdiction thereof) and the governing board of each rural high school district, and the commissioners court of every county, for and on behalf of each common school district under its jurisdiction, shall be authorized and have the power to acquire, purchase, construct, improve, enlarge, equip, operate, and maintain gymnasia, stadia, or other recreational facilities for and on behalf of its district, and such facilities may be located within or without the district.

§ 20.22. Revenue Bonds

For the purpose of providing funds to acquire, purchase, construct, improve, enlarge, and/or equip gymnasia, stadia, or other recreational facilities, such board or commissioners court shall be authorized to issue its revenue bonds to be payable from and secured by liens on and pledges of all or any part of any of the revenues from any rentals, rates, charges, or other revenues from any or all of such facilities, in the manner hereinafter provided. Said bonds may be additionally secured by mortgages and deeds of trust on any real property on which any of said facilities are or will be located, or any real or personal property incident or appurtenant to said facilities, and the board or the commissioners court may authorize the execution and delivery of trust indentures, mortgages, deeds of trust or other forms of encumbrances to evidence same. Said bonds may be issued to mature serially or otherwise not to exceed 50 years from their date. In the authorization of any such bonds, each board or the commissioners court may provide for the subsequent issuance of additional parity bonds, or subordinate lien bonds, or other types of bonds, under such terms or conditions as may be set forth in the resolution or order authorizing the issuance of said bonds, all within the discretion of the board or commissioners court. Said bonds, and any interest coupons appertaining thereto, shall be negotiable instruments (provided that such bonds may be issued registrable as to principal alone or as to both principal and interest), and shall be executed, and may be made redeemable prior to maturity, and may be issued in such form, denominations, and manner, and under such terms, conditions, and details, and may be sold in such manner, at such price, and under such terms, and said bonds shall bear interest at such rates, as shall be determined and provided by the board or commissioners court in the resolution or order authorizing the issuance of said bonds. If so permitted in the bond resolution or order, any required part of the proceeds from the sale of the bonds may be used for paying interest thereon during the period of the construction of any facilities to be provided through the issuance of said bonds, and for the payment of operation and maintenance expenses of said facilities to

the extent, and for the period of time, specified in said bond resolution, and also for the creation of reserves for the payment of the principal of and interest on the bonds; and such moneys may be invested, until needed, to the extent, and in the manner provided, in said bond resolution or order.

§ 20.23. Rentals, Rates, and Charges

The board or commissioners court shall be authorized to fix and collect rentals, rates, and charges, from students and others for the occupancy or use of any of said facilities, in such amounts and in such manner as may be determined by such board or commissioners court.

§ 20.24. Pledge of Revenues

The board or commissioners court shall be authorized to pledge all or any part of any of its revenues from the aforesaid facilities to the payment of any bonds issued hereunder, including the payment of principal, interest, and any other amounts required or permitted in connection with said bonds. When any of the revenues from said facilities are pledged to the payment of bonds, the rentals, rates and charges for the occupancy or use thereof shall be fixed and collected in such amounts as will be at least sufficient to provide for all payments of principal, interest, and any other amounts required in connection with said bonds, and, to the extent required by the resolution or order authorizing the issuance of said bonds, to provide for the payment of operation, maintenance, and other expenses.

§ 20.25. Refunding Bonds

Any revenue bonds issued by any such board or commissioners court under this subchapter, and any revenue bonds issued by any such board or commissioners court under any other Texas statute and payable from revenues from any such facilities may be refunded or otherwise refinanced by such governing board or commissioners court, and in such case all pertinent and appropriate provisions of this subchapter shall be fully applicable to such refunding bonds. In refunding or otherwise refinancing any such bonds the board or commissioners court may, in the same authorizing proceedings, refund or refinance bonds issued pursuant to this code and bonds issued pursuant to any other such Texas statute and combine all said refunding bonds and any other additional new bonds to be issued pursuant hereto into one or more issues or series of bonds, and may provide for the subsequent issuance of additional parity bonds, or subordinate lien bonds, or other type of bonds. All refunding bonds shall be is-

sued and delivered under such terms and conditions as may be set forth in the authorizing proceedings.

§ 20.26. Examination of Bonds by the Attorney General

All bonds issued pursuant to this subchapter, and the appropriate proceedings authorizing their issuance, shall be submitted to the attorney general of Texas for examination. If he finds that such bonds have been authorized in accordance with law he shall approve them, and thereupon they shall be registered by the comptroller of public accounts of Texas; and after such approval and registration such bonds shall be incontestable in any court, or other forum, for any reason, and shall be valid and binding obligations in accordance with their terms for all purposes.

§ 20.27. Bonds Eligible as Investments and Security

All bonds issued pursuant to this subchapter shall be legal and authorized investments for all banks, trust companies, building and loan associations, savings and loan associations, small business investment corporations, insurance companies of all kinds and types, fiduciaries, trustees, and guardians, and for all interest and sinking funds and other public funds of Texas and all agencies, subdivisions, and instrumentalities thereof, including all counties, cities, towns, villages, school districts, and all other kinds and types of districts, public agencies and bodies politic. Said bonds also shall be eligible and lawful security for all deposits of public funds of Texas and all agencies, subdivisions, and instrumentalities thereof, including all counties, cities, towns, villages, school districts, and all other kinds and types of districts, public agencies, and bodies politic, to the extent of the market value of said bonds, when accompanied by any unmatured interest coupons appurtenant thereto.

[Sections 20.28 to 20.40 reserved for expansion]

SUBCHAPTER C. MISCELLANEOUS PROVISIONS

For provisions enacted in 1971 without reference to the Education Code, but related to the subject matter of this subchapter, see Article 2784g–2, Civil Statutes, set out in Appendix at the end of the Code in this Pamphlet.

§ 20.41. Proceeds; Use for Water, Sewer or Gas Connections

Whenever bonds are hereafter voted and issued by school districts for the statutory purpose of construction and equipment of school buildings in the district and the purchase of the necessary sites there-

for, the bond proceeds may be used, among other things, to pay the cost of acquiring, laying, and installing pipes or lines to connect with the water, sewer, or gas lines of an incorporated city or town, including home rule cities, or other municipal corporation, or private utility company (whether or not the water, sewer, or gas lines of such city, town, or other municipal corporation adjoin the school site or sites), so that the school district may afford its public free school buildings of the water, sewer, or gas services offered by such city, town, or other municipal corporation, or private utility company.

§ 20.42. Investment of Bond Proceeds in Obligations of United States; Interest Bearing Secured Time Bank Deposits

From and after the effective date of this code, any school district within the state which has or may have on hand any sums of money which are proceeds received from the issue and sale of bonds of any such school district, either before or after the effective date of this code, which proceeds are not immediately needed for the purposes for which such bonds were issued and sold, may, upon order of the board of trustees of such school district, place the proceeds of such bonds on interest bearing time deposit, secured in the manner provided in Section 23.63 of this code, with a state or national banking corporation within this state, or invest the proceeds of such bonds in bonds of the United States of America or in other obligations of the United States of America, as may be determined by the board of trustees of the school district; but such interest bearing secured time deposits or bonds or other obligations of the United States of America shall be of a type which cannot be cashed, sold or redeemed for an amount less than the sum deposited or invested therein by such school district; and when such sums so placed or so invested by a school district are needed for the purposes for which the bonds of the school district were originally authorized, issued and sold, such time deposits or bonds or other obligations of the United States of America in which such sums have been placed or invested shall be cashed, sold or redeemed and the proceeds thereof shall be used for the purposes for which the bonds of the school district were originally authorized, issued and sold.

§ 20.43. Interest Bearing Time Warrants

(a) Any school district in the State of Texas in need of funds to repair or renovate school buildings; purchase school buildings and school equipment; to equip school properties with necessary heating, water, sanitation, lunchroom and electric facilities; or is in need of funds with which to employ an individual firm or corporation deemed

to have special skill and experience to compile taxation data for use by its board of equalization; and said school district is financially unable out of available funds to make such repairs, renovations of school buildings, purchase school buildings, purchase school equipment, to equip school properties with necessary heating, water, sanitation, lunchroom or electric facilities or is unable to pay such individual or corporation for the performance of the professional duties hereinabove mentioned, may, subject to the provisions hereof, issue interest-bearing time warrants, in amounts sufficient to make such purchase and improvements, to pay all or part of the compensation of such individual, firm or corporation to compile such data, any law to the contrary notwithstanding. Such warrants shall mature in serial installments of not more than five years from their date of issue, and to bear interest at a rate not to exceed six percent per annum. Such warrants shall upon maturity be payable out of any available funds of such school district in the order of their maturity dates. Any such interest-bearing time warrants so issued may be issued and sold by such district for not less than their face value, and the proceeds thereof used to provide funds required for the purpose for which they are issued. Such warrants shall be entitled to first and prior payment out of any available funds of such district as they become due. Included in such purposes is the payment of any amounts owed by said school districts, which indebtedness was incurred in carrying out any of such purposes.

(b) No such interest-bearing time warrants shall be issued or sold by a common school district, rural high school district, or an independent school district of less than 150 scholastics until the same shall have been approved by the county board of school trustees; and said board shall, upon application of such school district, inquire into the financial conditions and needs of such district, and shall not approve the issuance of such interest-bearing time warrants unless in its opinion said district is in need of such repair and renovation of school building, and school equipment and to equip school properties with necessary heating, water, sanitation, lunchroom and electric facilities, and will be able with the resources in prospect to liquidate said warrants at their maturity.

(c) No school district in the State of Texas shall issue such interest-bearing time warrants in excess of two percent of the assessed valuation of the district, for the year in which such interest-bearing time warrants are issued; nor shall the payment of such interest-bearing time warrants in any one year exceed the anticipated surplus income of the district for the year in which the warrants are issued. Based on the budget of the district for said year, such anticipated income to be computed by taking the entire expected income of such

school district from every source for the year in which such interest-bearing time warrants are issued, less teachers' salaries, bus aid included in the foundation fund, and that part of the local maintenance tax earmarked for salaries and known in the Gilmer-Aiken Law as the economic index or fund assignment. The anticipated income computation as herein defined shall be exclusive of all bond taxes. No school district shall have outstanding at any one time warrants totaling in excess of $60,000 under the provisions of this section.

(d) In every instance wherein interest-bearing time warrants or other evidence of indebtedness have been issued by school districts within the State of Texas for any of the purposes herein provided for, the act of the board of trustees, and/or governing board of such district in issuing such interest-bearing time warrants are each and all thereby expressly validated. The indebtedness thus attempted to be created by such action is hereby declared to be the indebtedness of such district and shall be paid out of available funds as herein provided.

(e) Whenever any such interest-bearing time warrants have been issued under this section, and so long as any of them may be outstanding the officer in charge of the collection of delinquent taxes shall pay the same to legal depository of the district, to be deposited and held in a special fund for the payment of such interest-bearing time warrants, and except as herein otherwise provided, no part thereof shall be applied or used for any other purpose.

(f) Interest and penalties on delinquent taxes shall be deemed a part of such taxes for the purpose of this section. Should any delinquent taxes, including interest and penalties, be cancelled, waived, released or reduced either by such school district or in any other way, with or without its consent, the amount of the loss so sustained shall be paid by the district to the special fund provided for herein out of funds not otherwise pledged to such special fund.

(g) All school districts issuing interest-bearing time warrants shall have the power to fix lien on and encumber and mortgage any and all property purchased with the proceeds of such warrants, and to fix a lien on and encumber any property, including teacherages owned by the district to secure the payment of legally incurred obligations. Provided, however, there shall never be a valid lien authorized or fixed on any school building wherein actual classroom instruction of pupils attending such school is being carried on or conducted.

(h) The word "interest-bearing time warrant" as used in this section means promissory note, interest-bearing time warrant, obligation or other evidence of indebtedness issued under this section.

(i) Taxes levied in any year to pay principal and interest of bonds and which taxes subsequently become delinquent for the purpose of

this section, shall not be included in the term taxes or revenues or delinquent taxes as herein used.

Subsec. (c) amended by Acts 1971, 62nd Leg., p. 1512, ch. 405, § 39, eff. May 26, 1971.

§ 20.44. Delinquent Tax Penalties in Independent Districts Having City of 275,000

(a) That the board of education or the board of trustees, as the case may be, of any independent school district within the State of Texas, whether created by general law or special act of the legislature, and wherein there may be situated a city having not less than 275,000 population according to the last preceding federal census, shall have the power by passing a resolution bby [1] a majority vote of the members of said board of education or board of trustees, as the case may be, beginning with 1933 delinquent taxes due to any such school district, to require in addition to the payment of any such delinquent taxes, in lieu of the present penalties provided by law, the payment of a penalty of two percent upon the amount of the tax due if paid during the first month of such delinquency, four percent if paid during the second month of such delinquency, six percent if paid during the third month of such delinquency, eight percent if paid during the fourth month of such delinquency, nine percent if paid during the fifth month of such delinquency, and 10 percent if paid thereafter. Such resolution shall provide that, in addition to the payment of the tax and penalty as provided, interest at the rate of six percent per annum shall be charged and paid upon the gross amount of the tax and penalty due from the date the tax became delinquent until paid.

(b) Until and unless the board of education or board of trustees of any such independent school district shall pass the resolution provided for in the next preceding section hereof, the penalties and interest now provided by law on delinquent taxes due to any such independent school district shall be and remain in full force and effect.

(c) Notwithstanding the fact that such board of education or board of trustees of any such independent school district may hereafter, during any particular year, pass a resolution as provided for in Subsection (a) of this section, such action may be rescinded as to future years thereafter by a resolution passed by such board of education or board of trustees in any such school district by a majority vote of the members of such board of education or board of trustees, in which event the same interest and penalties now provided by law on delinquent taxes due to independent school districts shall immediately accrue on all taxes thereafter becoming delinquent if such taxes be not paid before the same become delinquent.

[1] So in enrolled bill.

§ 20.45. Pledge of Delinquent Taxes as Security for Loan

The board of trustees of any school district of Texas is hereby authorized to pledge its delinquent school taxes levied for local maintenance purposes for specific school years as security for a loan, and such delinquent taxes pledged shall be applied against the principal and interest of the loan as they are collected. Provided, there shall be no pledging of delinquent taxes levied for school bonds for purposes herein set out. Funds secured through such loans may be employed for any legal maintenance expenditure or purpose of the school district. Provided further, that such loans may bear interest at a rate not to exceed six percent per annum.

§ 20.46. Additional Tax for Construction, Repair and Equipment of School Buildings; Purchase of Sites; Election

(a) Any school district, whether created under general or special law, having all or a portion of its territory situated in a county having a population of more than 190,000 according to the last preceding federal census, shall have the authority to levy an ad valorem tax, not to exceed 50 cents per $100 valuation, for the purpose of paying the cost of the purchase, construction, repair, renovation or equipment of public free school buildings and the purchase of necessary sites therefor, provided, however, that no bonds or other evidence of indebtedness may be issued payable in whole or in part from the tax herein authorized; and provided further that no contract shall be made which will encumber more than the revenues to be collected from said tax in any one fiscal year.

(b) This additional tax for the maintenance of public free schools shall not be levied or collected until such time as it has been approved by a mojority [1] of the resident, qualified, property-taxpaying voters who own taxable property within the district which has been duly rendered for taxation, participating in an election called for that purpose, have approved the additional maintenance tax. Nothing herein shall prohibit the submission of other propositions at such election; provided, however, that the proposition for the additional maintenance tax shall not be included in any other maintenance tax proposition, but shall be voted upon separately.

(c) It is the intent of this section to confer upon the school districts situated in large counties the right and power to make contracts for the expenditure of current funds for the same purpose as it may issue bonds, without the necessity of issuing bonds and paying the interest on such obligations, and shall be construed to this end and as not being in conflict with the provisions of any other law regulating the issuance of bonds. The election for the additional maintenance

tax shall be called and held in the manner provided by Section 20.-04(a) and (e) of this code.

(d) The provisions of this statute shall not preclude the use of other tax revenues for such revenues to be so used.

[1] So in enrolled bill.

§ 20.47. Additional Tax for Construction, Repair and Equipment of Schools in Counties With Population in Excess of 150,000; Purchase of Sites; Election

(a) Any school district whether created under general or special law, having all or a portion of its territory situated in a county having a population of more than 150,000 according to the last preceding federal census and having or acquiring the authority to levy under then existing law an ad valorem tax of not to exceed $1.75 per $100.00 of assessed valuation for maintenance purposes, shall have the authority to levy, apportion and expend out of any such maintenance tax levy $.50 per $100.00 of assessed valuation for the purpose of paying the cost of purchase, construction, repair, renovation and equipment of public free school buildings and purchase of sites therefor; provided, however, that no bonds or other evidences of indebtedness may be issued payable in whole or in part from the maintenance tax so levied and allocated and provided further that no contract shall be made which will encumber more than the revenues on hand and to be collected from said tax in any one fiscal year.

(b) The levy, allocation and expenditure of such portion of the maintenance tax as herein provided, may be made after such action has been approved by a majority of the resident, qualified property-taxpaying voters, who own taxable property within the district which has been duly rendered for taxation, participating in an election called for that purpose. This section shall not affect maintenance taxes levied for the year 1958 and prior years by any school district adopting same.

(c) It is the intent of this section to confer upon school districts to which it is applicable now or hereafter, the right and power to make contracts for the expenditure of maintenance funds for the same purpose as it may issue bonds, without the necessity of issuing bonds and paying the interest on such obligations and this section shall be construed to this end and as not being in conflict with the provisions of any other law regulating the issuance of bonds. The election for the allocation and expenditure of such maintenance tax as provided herein shall be called and held in the manner provided by Section 20.-04(a) and (3) of this code.

(d) The provisions of this statute shall not preclude the use of any tax revenues for the same or different purposes as herein specified to the extent it is now lawful for such revenues to be used.

§ 20.48. Authorized Expenditures

(a) The public free school funds shall not be expended except as provided in this section.

(b) The state and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents, when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year.

(c) Local school funds from district taxes, tuition fees of pupils not entitled to free tuition and other local sources may be used for the purposes enumerated for state and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employees, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools to be determined by the board of trustees, the accounts and vouchers for county districts to be approved by the county superintendent; provided, that when the state available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months, and leave a surplus, such surplus may be expended for the purposes mentioned herein.

(d) All independent school districts having within their limits a city with a population of 160,000 or more according to the last preceding federal census shall, in addition to the powers now possessed by them for the use and expenditure of local school funds and for the issuance of school bonds, be expressly authorized and empowered, at the option of the governing body of any such school district, in the buying of school sites and/or additions to school sites and in the building of school houses, to issue and deliver notes of the school district, negotiable or non-negotiable in form, representing all or a part of the purchase price or cost to the school district of the land and/or building so purchased or built, and to secure such notes by a vendor's lien and/or deed of trust lien against such land and/or building, and, by resolution or order of the governing body of the school district made at or before the delivery of such notes, to set aside and appropriate as a trust fund, and the sole and only fund, for the payment of the principal of and interest on such notes such part

and portion of the local school funds, levied and collected by the school district in that year and/or subsequent years, as the governing body of the school district may determine, provided that in no event shall the aggregate amount of local school funds set aside in or for any subsequent year for the retirement of such notes exceed, in any one such subsequent year, 10 percent of the local school funds collected during such year.

§ 20.481. Use of County Available Fund Apportionment for Vocational and Technical Schools

Where any public school district or accumulation of districts of this state operates a school designated as an area vocational school for vocational and technical school purposes and/or which participates in such a designated area vocational school program, its annual county available school fund apportionment, if any, shall be employed in the operation of such school and/or in financing facilities therefor notwithstanding any laws to the contrary; provided further, that any such school district(s) shall not be held accountable for or charged with county available school funds in determination of eligibility for minimum foundation school program funds.

Added by Acts 1971, 62nd Leg., p. 3008, ch. 994, § 4, eff. Aug. 30, 1971.

§ 20.49. Borrowing Money for Current Maintenance Expenses

(a) Independent or consolidated school districts are hereby authorized to borrow money for the purpose of paying maintenance expenses and to evidence such loans with negotiable notes; provided that at no time shall said loans exceed 75% of the previous years' income. Such notes shall be payable only from current maintenance taxes levied at or before the time of making such loans and from delinquent maintenance taxes. The term "maintenance expenses" or "maintenance expenditures" as used in this section means any lawful expenditure of the school district other than payment of principal of and interest on bonds.

(b) Such notes may be issued only after a budget has been adopted for the current school year and the maintenance expenditures stated therein do not exceed the maintenance tax levied for the current year, plus the delinquent maintenance taxes expected by the board of trustees to be collected during the then current school year. A budget, within the meaning of this section, may be amended or a new budget may be adopted at any time before the issuance of such notes.

(c) Such notes shall be authorized by resolution adopted by a majority vote of the board of trustees, signed by the president or vice

president and attested by the secretary of said board. The notes shall bear interest at a rate of not to exceed six percent per annum.

(d) Any such note may contain a certification that it is issued pursuant to and in compliance with this section, and pursuant to a resolution duly adopted by the board of trustees, and such certification shall constitute sufficient evidence that said note is a valid and binding obligation of the district.

(e) This section is cumulative of and is not intended to replace or impair the provisions of Section 20.48 of this code.

§ 20.50. Contracts for Athletic Facilities

(a) Any independent school district, acting by and through its board of trustees, is hereby authorized to enter into a contract with any corporation, or any city or any institution of higher learning of the State of Texas (State University or College) located wholly or partially within its boundaries, for the use of any stadium and other athletic facilities owned by, or under the control of, any such entity. Such contract may be for any period, not exceeding 75 years, and may contain such terms and conditions as may be agreed upon between the parties.

(b) The district may enter into such contract for the use of such stadium and other athletic facilities for any purpose related to sports activities and other physical education programs for the students at the public free schools operated and maintained by such independent school district.

(c) The consideration for any such contract may be paid from any source available to such independent school district; but it [1] voted, as hereinafter provided, such independent school district shall be authorized to pledge to the payment of said contract an annual maintenance tax in an amount sufficient, without limitation, to provide all of such consideration. If so voted and pledged, such maintenance tax shall be assessed, levied, and collected annually in the same manner as provided by general law applicable to independent school districts for other maintenance taxes.

(d) No maintenance tax shall be pledged to the payment of any such contract or assessed, levied or collected unless an election is held in the independent school district and any such maintenance tax is duly and favorably voted by a majority of the resident, qualified electors of the independent school district who own taxable property therein and who have duly rendered the same for taxation, voting at said election. Each such election shall be called by order of the baord of trustees of the independent school district. The election order shall set forth the date of the election, the proposition to be submitted

and voted on, the polling place or places, and any other matters deemed advisable by the board of trustees. Notice of said election shall be given by publishing a substantial copy of the order calling the election one time, at least ten days prior to the election, in a newspaper of general circulation in the district. Except as herein otherwise specifically provided, any such election saall [1] be held in accordance with the Texas Election Code.

[1] So in enrolled bill.

71-1332

Supreme Court, U. S.
FILED
APR 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellants

v.

DEMETRIO P. RODRIGUEZ, ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Texas entered on December 23, 1971, and from the clarification of that judgment entered on January 26, 1972, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court for the Western District of Texas is not yet reported. The opinion and judgment and the clarification of the original opinion and judgment are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1331 and 1343 for a declaratory judgment and an injunction against enforcement of Article VII, § 3, of the Texas Constitution and the sections of the Texas Education Code relating to the financing of education. A statutory three-judge court was convened pursuant to 28 U.S.C. § 2281. On December 23, 1971, that court entered its judgment granting an injunction as prayed for by the plaintiffs. A motion for clarification was filed by the defendants on December 28, 1971, and on January 26, 1972, a new judgment was entered on behalf of the three-judge court to make it clear that the judgment does not affect the validity or enforceability of outstanding school district bonds or of those that may be issued in the next two years. Notice of appeal was filed in the District Court on February 16, 1972. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Although the order of the court below was stayed for two years from the entry of the original judgment and the court retained jurisdiction to take further steps if necessary to implement its order in the event that the Texas legislature should fail to act within two years, it stated, in both the original and the clarified judgment, its understanding that "this constitutes no impediment with respect to the finality of this judgment for the purpose of appeal, and none is intended." The view of the District Court that this Court has jurisdiction to review the judgment on direct appeal despite the reservation of jurisdiction is supported by such cases as *Swann v. Adams,* 385 U.S. 440 (1967), and *Reynolds v. Sims,* 377 U.S. 533 (1964).

Question Presented

Whether Section 3 of Article VII of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of education violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides in relevant part: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Section 3 of Article VII of the Constitution of the State of Texas provides as follows:

> Sec. 3. One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that should the limit of taxation herein named be insufficient the

deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

It would serve no useful purpose to reproduce at this point the Texas statutory provisions involved. The statutes are numerous and lengthy. Both the plaintiffs in their complaint below and the three-judge court in its judgment were content to refer merely to "the sec-

tions of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act," and did not specify which statutory provisions they found objectionable.

Statement

This action was brought as a class action on behalf of Mexican-American school children and their parents who live in the Edgewood Independent School District in Bexar County, Texas, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Numerous state and local officials and school districts were named as defendants. They claimed that the present system of financing public schools in Texas is discriminatory because it makes the quality of education received by students a function of the wealth of their parents and neighbors as measured by the tax rate and property values of the school district in which they reside. They further claimed that the system discriminates against school districts in which there is a high percentage of Mexican-Americans.

Although the details of the Texas system for financing public education are extremely complex, the general plan can be fairly readily described. In essence, it is a combination of ad valorem taxes levied by school districts with a state contribution that is intended to assure every child in the state of at least a minimum foundation education. The state contribution is calculated in a fashion that has a mildly equalizing effect.

The heart of the Texas system is the Minimum Foundation Program. *Texas Education Code*, §§ 16.01 *et seq.* Under that program more than a billion dol-

lars a year is provided to cover the costs of salaries of professional personnel, school maintenance, and transportation. Eighty percent of the amount to which a school district is entitled under the Minimum Foundation Program is paid by the state from general revenue. The balance of the cost of the minimum program comes from the school districts under the Local Fund assignment. *Texas Education Code,* §§ 16.71-16.73. An economic index is used so that each county's contribution to the Local Fund Assignment approximates that county's percentage of statewide taxpaying ability. *Texas Education Code,* §§ 16.74, 16.76. Within each county the portion of the Local Fund Assignment that each school district is expected to contribute is the percentage of the county's assignment that the value of the property in the school district is of the value of all of the property in the county. *Texas Education Code,* § 16.76. Thus, while the state contributes, on an overall basis, 80% of the cost of the Minimum Foundation Program, in some districts that lack the ability to raise substantial funds by local effort the state contribution is in excess of 98% of the cost of the Minimum Foundation Program, while in districts with greater ability to pay the state contribution is less than 80%.

Each district is then free to supplement the minimum program with additional funds raised by local ad valorem taxes. *Texas Education Code,* §§ 20.01 *et seq.* In combination, the Texas plan assures every child in the state of a certain minimum level of education on a nondiscriminatory basis but allows each local school district to provide educational benefits above the minimum to the extent that the district wants them and can afford them.

The court below ignored, quite properly, the claim of discrimination against Mexican-Americans. It accepted, however, the plaintiffs' claim that the Texas plan is unconstitutional because "wealthy" school districts can and do spend more per child for education than do "poor" school districts. It held that the Equal Protection Clause of the Fourteenth Amendment embodies a standard of "fiscal neutrality," which means that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." The court enjoined enforcement of the Texas laws on the financing of education "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole." It ordered defendants to reallocate the funds available for financial support of the school system, including local ad valorem taxes, in a fashion consistent with what it thought to be required by the Equal Protection Clause. It stayed its mandate for two years to give the defendants and the legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law as it had declared it and included language in the clarification of its judgment intended to make it clear that its order does not affect the validity of school bonds and similar financial obligations already issued or that may be issued within the two year period of the stay.

The Questions Are Substantial

1. The court below has read into the Equal Protection Clause a limitation on the freedom of states to govern themselves that would, if it is upheld, require striking down the systems of school financing used

in 49 of the 50 states. Although the state plans vary in their particulars, they do commonly depend on some combination of state funds and local ad valorem taxes. Only in Hawaii, so it is said, does the present financing plan satisfy the standard that the court below has found to be constitutionally required.

2. The decision below would adversely affect the quality of public education in the state. It is difficult to believe that many, if any states, already under heavy financial pressures, would be able to provide each child throughout the state an amount for education equal to that now spent per child in the districts of the state with the greatest resources. Equalizing amounts spent on education on a state-wide basis would almost certainly be done at a level that would not significantly increase the overall expenditure for education. The result would be some improvement—to the extent that the quality of education may be a function of the amount spent—in education in the worst schools at the expense of the best schools. Quality education would be sacrificed in the name of equality. See Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U.CHI.L.REV. 583, 590-591 (1968).

3. The decision below would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation. It is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of that education is reduced. So long as *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), remains authoritative, a ready alternative is at hand for those with comfortable means. The decision below would encourage flight

away from the public schools at a time when the public schools are the principal hope of achieving a society that is not divided by artificial barriers of race or class or wealth.

4. The decision below is not required by prior decisions of this Court. The principle of "fiscal neutrality" accepted as constitutionally required by the court below, as well as by other courts that have reached similar results, was stated as Proposition I in an engaging and provocative article, Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CALIF.L.REV. 305, 311 (1969). Those authors were quite candid about the existing state of the law. They said, at 372:

> Concededly, Proposition I is not a logical extension of any existing doctrine, and the argument for it will be dictated more by purely policy considerations than by syllogisms.

Perhaps it would be sound public policy to provide for homogenized education, but one need not hold the naive view that policy considerations play no part in the growth of the law to believe that a policy judgment of that kind is appropriately made by a legislative body rather than a court.

5. The decision below is contrary to prior decisions of this Court. In *McInnis v. Ogilvie,* 394 U.S. 322 (1969), and in *Burruss v. Wilkerson,* 397 U.S. 44 (1970), this Court summarily affirmed decisions of district courts that had rejected challenges to the system of public school financing similar to the challenge made in the present case. In those cases the Court had the benefit of amicus briefs from distinguished lawyers

urging reversal. Professor Coons and his associates appeared as friends of the Court to suggest to the Court the arguments they were about to publish in their article that has been so influential. Despite all of this the Court chose to affirm. Affirmance of a three-judge district court by this Court cannot be lightly written off, as some have since suggested, as akin to a denial of certiorari. It is a decision on the merits. STERN & BRESSMAN, SUPREME COURT PRACTICE 197 (4th ed. 1969); WRIGHT, FEDERAL COURTS 495 (2d ed. 1970). In the light of those recent decisions from this Court, it would be appropriate, if the decision below stood alone, to move for summary reversal. Unfortunately the present decision does not stand alone. Other courts have yielded to the seductive charms of this newly-discovered doctrine. *E.g., Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971); *Van Dusartz v. Hatfield*, 334 F.Supp. 870 (D.Minn. 1971). Under those circumstances it seems appropriate that this Court hear oral argument in the matter and resolve the issue in a way that cannot be misunderstood by lower state and federal courts. If the Court should agree that argument ought to be heard in this case, Texas respectfully requests that the case be set for argument on an expedited basis early in the 1972 Term. The Texas legislature convenes in its biennial session in January, 1973, and an early decision from this Court, advising the legislature whether any change in the Texas system of public school financing is required, would be of advantage to the legislature in deciding how, if at all, it should respond to the order of the three-judge court.

CONCLUSION

For the foregoing reasons, it is submitted that this

Court should note probable jurisdiction of the present case and set it for argument early in the 1972 Term.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of April, 1972, I served three copies of the foregoing Jurisdictional Statement on the Appellees by depositing such copies in the United States Mail, postage prepaid, and addressed to the attorney of record for Appellees as follows: Mr. Arthur Gochman, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, Mario Obledo, 145 9th Street, San Francisco, California 94103.

Pat Bailey

PAT BAILEY

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.,
v.
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Before GOLDBERG, Circuit Judge; SPEARS, Chief District Judge; and ROBERTS, District Judge.

PER CURIAM:

Pursuant to Rule 23, Federal Rules of Civil Procedure, plaintiffs bring this action on behalf of Mexican American school children and their parents who live in the Edgewood Independent School District, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Jurisdiction of this matter is proper under 28 U.S.C. §§ 1331, 1343. This Court finds merit in plaintiffs' claim that the current method of state financing for public elementary and secondary education deprives their class of equal opportunity of the laws under the Fourteenth Amendment to the United States Constitution.[1]

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[1] See Serrano v. Priest, 5 Cal. 3d 584, — P. 2d — (1971); and Van Dusartz v. Hatfield, — F. Supp. — (D. Minn. 1971). Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth, and Van

Edgewood and six other school districts lie wholly or partly within the city of San Antonio, Texas. Five additional districts are located within rural Bexar County. All of these districts and their counterparts throughout the State are dependent upon federal, state, and local sources of financing. Since the federal government contributes only about ten percent of the overall public school expenditures, most revenue is derived from local sources and from two state programs—the Available School Fund and the Minimum Foundation Program. In accordance with the Texas Constitution, the $296 million in the Available School Fund for the 1970-1971 school year was allocated on a per capita basis determined by the average daily attendance within a district for the prior school year.

Costing in excess of one billion dollars for the 1970-1971 school year, the Minimum Foundation Program provides grants for the costs of salaries, school maintenance and transportation. Eighty percent of the cost of this program is financed from general State revenue with the remainder apportioned to the school districts in "the Local Fund Assignment." TEX. EDUC. CODE ANN. arts. 16.71-16.73 (1969). Although generally measuring the variations in taxpaying ability, the Economic Index employed by the State to determine each district's share of "the Local Fund Assignment" (TEX. EDUC. CODE ANN. arts 16.74-16.78) has come under increasing criticism.*

Dusartz points out that in this type case "the variations in wealth are state created. This is not the simple instance in which the poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the state itself has defined and commissioned."

*See THE CHALLENGE AND THE CHANCE, RPT. OF THE GOVERNOR'S COMM. ON PUBLIC SCHOOL EDUC.

To provide their share of the Minimum Foundation Program, to satisfy bonded indebtedness for capital expenditures, and to finance all expenditures above the state minimum, local school districts are empowered within statutory or constitutional limits to levy and collect ad valorem property taxes. TEX. CONST. art. 7, §§ 3, 3a; TEX. EDUC. CODE ANN. art. 20.01, et seq. Since additional tax levies must be approved by a majority of the property-taxpaying voters within the individual districts, these statutory and constitutional provisions require as a practical matter that all tax revenues be expended solely within the district in which they are collected.

Within this ad valorem taxation system lies the defect which plaintiffs challenge. This system assumes that the value of property within the various districts will be sufficiently equal to sustain comparable expenditures from one district to another. It makes education a function of the local property tax base. The adverse effects of this erroneous assumption have been vividly demonstrated at trial through the testimony and exhibits adduced by plaintiffs. In this connection, a survey of 110 school districts* throughout Texas demonstrated that while the ten districts with a market value of taxable property per pupil above $100,000 enjoyed an equalized tax rate per $100 of only thirty-one cents, the poorest four districts, with less than $10,000 in property per pupil, were burdened with a rate of seventy cents. Nevertheless, the low rate of the

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58-68 (1968). The accuracy of the Economic Index is the subject of separate litigation in Fort Worth Ind. School Dist. v. J. W. Edgar, (N.D. Tex., Fort Worth Div.).

*The total number of districts in the state is approximately 1200.

rich districts yielded $585 per pupil, while the high rate of the poor districts yielded only $60 per pupil. As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominantly minority in composition.[3]

Data for 1967-1968 show that the seven San Antonio school districts follow the statewide pattern. Market value of property per student varied from a low of $5,429 in Edgewood, to a high of $45,095 in Alamo Heights. Accordingly, taxes as a percent of the property's market value were the highest in Edgewood and the lowest in Alamo Heights. Despite its high rate, Edgewood produced a meager twenty-one dollars per pupil from local ad valorem taxes, while the lower rate of Alamo Heights provided $307 per pupil.

Nor does State financial assistance serve to equalize these great disparities. Funds provided from the combined local-state system of financing in 1967-1968 ranged from $231 per pupil in Edgewood to $543 per pupil in Alamo Heights. There was expert testimony to the effect that the current system tends to subsidize the rich at the expense of the poor, rather than the other way around. Any mild equalizing effects that state aid may have do not benefit the poorest districts.

For poor school districts educational financing in Texas is, thus, a tax more, spend less system. The constitutional and statutory framework employed by

[3]Plaintiffs' Exhibit VIII shows 1960 median family income of $5,900 in the top ten districts and $3,325 in the bottom four. The rich districts had eight per cent minority pupils while the poor districts were seventy-nine percent minority.

the State in providing education draws distinction between groups of citizens depending upon the wealth of the district in which they live. Defendants urge this Court to find that there is a reasonable or rational relationship between these distinctions or classifications and a legitimate state purpose. This rational basis test is normally applied by the courts in reviewing state commercial or economic regulation. *See, e.g., McCowan v. Maryland,* 366 U.S. 420 (1961); *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955). More than mere rationality is required, however, to maintain a state classification which affects a "fundamental interest," or which is based upon wealth. Here both factors are involved.

These two characteristics of state classification, in the financing of public education, were recognized in *Hargrave v. McKinney,* 413 F. 2d 320, 324 (5th Cir. 1969), *on remand, Hargrave v. Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds sub nom., *Askew v. Hargrave,* 401 U.S. 476 (1971). Among the authorities relied upon to support the *Hargrave* conclusion "that lines drawn on wealth are suspect" is *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 668, (1965).[1] In striking down a poll tax requirement because of the possible effect upon indigent voting, the Supreme Court concluded that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifica-

[1] In addition, the court relied upon Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956), which are decisions invalidating state laws that discriminated against criminal defendants because of their poverty.

tions is to introduce a capricious or irrelevant factor." Likewise *McDonald v. Bd. of Elections Comm'rs of Chicago,* 394 U.S. 802, 807 (1969), noted that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."

Further justification for the very demanding test which this Court applies to defendants' classifications is the very great significance of education to the individual. The crucial nature of education for the citizenry lies at the heart of almost twenty years of school desegregation litigation. The oft repeated declaration of *Brown v. Bd. of Education,* 347 U.S. 483, 493 (1954), continues to ring true:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Because of the grave significance of education both to the individual and to our society, the defendants

must demonstrate a compelling state interest that is promoted by the current classifications created under the financing scheme.

Defendants insist that the Court is bound by the opinions in *McInnis v. Shapiro,* 293 F. Supp 327 (N. D. Ill. 1968), aff'd mem. sub nom., 394 U.S. 322 (1969); and *Burrus v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem. sub nom., 397 U.S. 44 (1970). However, we disagree.

The development of judicially manageable standards is imperative when reviewing the complexities of a state educational financing scheme. Plaintiffs in *McInnis* sought to require that educational expenditures in Illinois be made solely on the basis of the "pupils' educational needs." Defining and applying the nebulous concept "educational needs" would have involved the court in the type of endless research and evaluation for which the judiciary is ill-suited.[4] Accordingly, the court refused the claim that the equal protection clause of the Fourteenth Amendment demands such an unworkable standard. The subsequent affirmance, without opinion, by the Supreme Court would not, in our opinion, bar consideration of plaintiffs' claim that lines in Texas have been drawn on the basis of wealth. The same situation prevails with respect to *Burrus* where the Court, in referring to the "varying needs" of the students, found the circumstances "scarcely distinguishable" from *McInnis.*

In the instant case plaintiffs have not advocated that

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[4]Difficulties in defining the term are discussed at note 4, 293 F. Supp. 329.

educational expenditures be equal for each child.[8] Rather, they have recommended the application of the principle of "fiscal neutrality." Briefly summarized, this standard requires that the quality of public education may not be a function of wealth, other than the wealth of the state as a whole. Unlike the measure offered in *McInnis,* this proposal does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the state may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child.

Considered against this principle of "fiscal neutrality," defendants arguments for the present system are rendered insubstantial. Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications. They urge the advantages of the present system in granting decisionmaking power to individual districts, and in permitting local parents to determine how much they desire to spend on their children's schooling. However, they lose sight of the fact that the state has, in truth and in fact, limited the choice of financing by guaranteeing that "some districts will spend low (with high taxes) while others will spend high (with low taxes).'" Hence, the present system does not serve to

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[8]Indeed, it is difficult to see how the defendants reach a contrary conclusion since even the McInnis plaintiffs did not request precisely equal expenditures per child.

[9]As the Court said in Van Dusartz v. Hatfield, supra, note 1: "By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the eco-

promote one of the very interests which defendants assert.

Indicative of the character of defendants' other arguments is the statement that plaintiffs are calling for "socialized education." Education like the postal service has been socialized, or publicly financed and operated almost from its origin. The *type* of socialized education, not the question of its existence, is the only matter currently in dispute. One final contention of the defendants however calls for further analysis. In essence, they argue that the state may discriminate as it desires so long as federal financing equalizes the differences. Initially, the Court notes that plaintiffs have successfully controverted the contention that federal funds do in fact compensate for state discrimination.[8] More importantly, defendants have not adequately explained why the acts of other governmental units should excuse them from the discriminatory consequences of state law. *Hobson v. Hansen, supra,* 269 F. Supp. at 496, countered defendants' view by finding that the federal aid to education statutes[9]

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nomic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible."

[8] Plaintiffs' Exhibit 8, Table X, indicates that while Edgewood receives the highest federal revenues per pupil of any district in San Antonio, $108, and Alamo Heights, the lowest, $36, the former still has the lowest combined local-state-federal revenues per pupil, $356, and the latter the highest, $594.

[9] The statutes involved were the Economic Opportunity Act, 42 U.S.C. §§ 2781-2791 (1964); the Elementary and Secondary Education Act, 20 U.S.C. §§ 241a-411 (1970 Supp.), and federally impacted areas aid, 20 U.S.C. §§ 236-244 (1964), *as amended,* (1970 Supp.).

> . . . are manifestly intended to provide extraordinary services at the slum schools, not merely to compensate for inequalities produced by local school boards in favor of their middle-income schools. Thus, they cannot be regarded as curing any inequalities for which the Board is otherwise responsible.

Since they were designed primarily to meet special needs in disadvantaged schools, these funds cannot be employed as a substitute for state aid without violating the Congressional will. Further support for this view is offered by a series of decisions prohibiting deductions from state aid for districts receiving "impacted areas" aid.[11] Performance of its constitutional obligations must be judged by the state's own behavior, not by the actions of the federal government.

While defendants are correct in their suggestion that this Court cannot act as a "super-legislature," the judiciary can always determine that an act of the legislature is violative of the Constitution. Having determined that the current system of financing public education in Texas discriminates on the basis of wealth

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[11]These cases have held that the statute clearly provides that the aid is intended as special assistance to local educational agencies, and that to permit a reduction in state aid would violate the Congressional intent. Douglas Ind. School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D. S.D. 1968); Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968); Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968); Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F. 2d 337 (9th Cir. 1970), and Triplett v. Tiemann, 302 F. Supp. 1244 (D. Neb. 1969). After these action arose, the statute was amended to prohibit aid to schools in any state which has "taken into consideration payments under this subchapter in determining the eligibility of any local educational agency in that State for State aid . . ." 20 U.S.C. §§ 240 (d) (2) (1969).

by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes, this Court concludes, as a matter of law, that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Article 7, § 3 of the Texas Constitution and the sections of the Education Code relating to the financing of education, including the Minimum Foundation Program.

Now it is incumbent upon the defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education." The selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole.

"On October 15, 1969 this Court indicated its awareness of the fact that the Legislature of Texas, on its own initiative, had authorized the appointment of a committee to study the public school system of Texas and to recommend "a specific formula or formulae to establish a fair and equitable basis for the division of the financial responsibility between the State and the various school districts of Texas." It was then felt that ample time remained for the committee to "explore all facets and all possibilities in relation to the problem area," in order for appropriate legislation to be enacted not later than the adjournment of the 62nd Legislature, and since the Legislature appeared ready to grapple with the problems involved, the trial of this cause was held in abeyance pending further developments. Unfortunately, however, no action was taken during the 62nd Session which has adjourned. Hopefully, the Governor will see fit to submit this matter to one or more special sessions so that members of the Legislature can give these complex and complicated problems their undivided attention.

Accordingly, IT IS ORDERED that:

(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act (Ch. 16), and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

(2) The mandate in this cause shall be stayed, and this Court shall retain jurisdiction in this action for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth, other than the wealth of the State as a whole, as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution. In the event the legislature fails to act within the time stated, the Court

is authorized to and will take further steps as may be necessary to implement both the purpose and the spirit of this order. See *Swann v. Adams,* 263 F. Supp. 225 (S.D. Fla. 1967); *Klahr v. Goddard,* 254 F. Supp. 997 (D. Ariz. 1966). Needless to say, the Court hopes that this latter action will be unnecessary.

Dated December 23, 1971.

IRVING L. GOLDBERG
United States Circuit Judge

ADRIAN A. SPEARS
Chief United States District Judge

JACK ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. 68-175-SA

DEMETRIO P. RODRIGUEZ, ET AL.,
v.
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Before GOLDBERG, Circuit Judge; SPEARS, Chief District Judge; and ROBERTS, District Judge.

CLARIFICATION OF ORIGINAL OPINION

PER CURIAM:

Having fully considered defendants' motion for clarification of judgment and the plaintiffs' response thereto, as well as the amicus curiae briefs submitted, the Court is of the opinion that the requests in said motion constituting nothing more than "clarifications" are already implicit in the full context of the language contained in our original opinion; nevertheless, in an attempt to dispell all possible doubt as to what was intended, prevent disruptions in the operation of the public school system in Texas, and avoid further delay on the final disposition of this litigation, it is ORDERED that paragraphs (1) and (2) on pages 8 and 9 of the opinion of this Court entered on December 23, 1971, be and they are hereby amended to read as follows:

(1) The defendants and each of them be preliminarily and permanently restrained and enjoined

from giving any force and effect to the operation of said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions;

(2) The mandate in this cause shall be stayed for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth other than the wealth of the State as a whole, as required by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Our holding that the plaintiffs have been denied

equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Articles 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation Program, shall have prospective application only, and shall not become effective until after the expiration of two years from December 23, 1971. This order shall in no way affect the validity, incontestibility, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or contractual obligation incurred by a school district in Texas for public school purposes, nor the validity or enforceability of any tax or other source of payment of any such bond, note, security or obligation; nor shall this judgment in any way affect the validity, incontestibility, obligation of payment, source of payment or enforceability of any bond, note or other security to be issued and delivered, or contractual obligation incurred by Texas school districts, for authorized purposes, during the period of two years from December 23, 1971, nor shall the validity or enforceability of any tax or other source of payment for any such bond, note or other security issued and delivered, or any contractual obligation incurred during such two year period be affected hereby; it being the intention of this Court that this judgment should be construed in such a way as to permit an orderly transition during said two year period from an unconstitutional to a constitutional system of school financing. The Court retains jurisdiction of this action to take such further steps as

may be necessary to implement both the purpose and spirit of this order, in the event the Legislature fails to act within the time stated, but, as we understand the law, this constitutes no impediment with respect to the finality of this judgment for the purpose of appeal, and none is intended. See *Swann v. Adams*, 385 U.S. 440 (1967, 263 F. Supp. 225 (S.D. Fla. 1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gunn v. Committee to End the War in Vietnam*, 399 U.S. 383 (1970); and *Klahr v. Goddard*, 254 F. Supp. 997 (D. Ariz. 1966). Needless to say, we hope that no further action by this Court will be necessary.

Dated January 26, 1972.

ADRIAN A. SPEARS,
Chief United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each such judge to so act.

FILED
APR 18 1972
MICHAEL RODAK, JR., CLERK

No. 71-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

INTERESTS OF AMICI CURIAE

Amici Curiae are representatives of state governments, or political subdivisions, in 38 states which have systems of school financing which can be viewed as inconsistent with the *Serrano-Rodriguez* rule. In most of these states suits are pending as part of a coordinated campaign attacking the nation's school financing system. In consequence of time limitations *amici* have not been able to secure the joinder in this brief of all forty-nine of the

American states with systems of school finance inconsistent with the supposed constitutional principle.[1]

The state and local governments represented by *amici curiae* all in varying degrees suffer from severe budgetary and financial stringency. The school systems in each and all of the states, including the school systems in the so called "wealthier" districts, have contractual commitments to suppliers of services, bondholders, and teachers and/or teachers' unions foreclosing any possibility of significant reduction in expenditures in such districts. It has been authoritatively estimated that the cost of increasing expenditures in each state to the level of the higher districts in the state would approximate 8 billion dollars per annum. In some states this outlay would result in immediate and severe revenue crises while in others it would result merely in an exhaustion of state taxing resources to the detriment of the state's ability to provide other essential health and welfare services.[2] For all practical purposes, the only recourse of the states would be a quest for relief from the federal government and a resulting reduction in state and local control over local school systems.

In each and all of the 49 states fiscal control of expenditures beyond the state foundation program is vested in local legislative bodies or school boards. The *Serrano-Rodriguez* rule would shift control of almost all save minor increments to educational expenditures to state legislative bodies and would result in an enforced fiscal unification of state school systems and drastic restructuring of the

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[1] Only Hawaii has a school finance system meeting this newly invented "imperative", and that system was not the product of democratic choice but an inheritance from territorial government.

[2] See the testimony of Dr. Charles Benson, Hearings Before the Select Committee on Equal Educational Opportunity, United States Senate, 90th Congress, 2nd Session, at pages 76-79 (1971) (hereinafter referred to as "Mondale Committee Hearings").

political institutions and processes of all but one of the fifty states.

The undersigned local school districts would be confronted in the event of application of the *Rodriguez* rule with either the need to carry out drastic reductions in educational expenditures, with concurrent wholesale teacher firings, disruptions, and teacher strikes or with a vastly increased tax burden for education wholly unanticipated by municipal officials and residents and ruinous to numerous property owners, including elderly property owners, with fixed incomes.

Many of the undersigned states have within their borders large cities with severe urban problems and substantial numbers of disadvantaged residents. According to recent studies the interests of most large cities would suffer from application of the *Serrano-Rodriguez* rule, since most large cities have higher than average tax bases and lower than average tax effort for education in relation to assessed valuation. These states and cities would be hindered and impaired in their ability to address urban problems by a constitutional requirement that they devote huge sums of money to elevating rural districts without pressing educational needs or social problems to the spending levels of the "wealthiest" suburbs. See United States Office of Education, *Finances of Large-City School Systems: A Comparative Analysis*, D.H.E.W. Publication # OE7229 (1972); Select Committee on Equal Educational Opportunity, United States Senate, *The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance* (January 1972), pages 66-73; Hearings Before the Select Committee on Equal Educational Opportunity, United States Senate, 92nd Congress, First Session, part 21, pages 10897, 10905 (Statement of Norman J. Chachkin, NAACP Legal Defense and Educational Fund, Inc., Novem-

ber 30, 1971); Myers, *Second Thoughts on the Serrano Case*, City: The Magazine of the National Urban Coalition, Volume 5, No. 6, page 38 (Winter 1971); Taylor, *The Richmond Ruling*, The Washington Post, January 16, 1972 pages B 1, B 5;[3] Bassett, *Leaders of Urban Schools Oppose Dollar-A-Scholar*, Baltimore News American, March 16, 1972, page 1, column 4.

Each and all of the undersigned states possesses a republican form of government within the meaning of Article Four of the United States Constitution. Each and all desires to maintain that system of goverment, and opposes transfer of the power of the purse of state legislatures to courts, either their own or those not of their creation.

STATEMENT OF THE CASE

The decision of the District Court in the *Rodriguez* case purports to impose as a constitutional imperative the proposition, discoverable nowhere in any constitutional provision, congressional debate, or even congressional bill that "the educational opportunities afforded the * * * children of the state of Texas are not made a function of wealth other than the wealth of the state as a whole, as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 at 286.) This "principle" has been somewhat differently formulated by the "constitutional convention" originating it, the meeting of the minds of the authors of Coons, Clune and Sugarman, *Private Wealth and Public Education* (1969): that a system is invalid which makes "the quality of a child's education a function of the wealth of his parents and neighbors". See also *Serrano v. Priest*, 5 Cal. 3d 584, 487

[3] Also in Mondale Committee Hearings, *supra*, part 21, pp. 10465, 10472.

P. 2nd 1241.[4] The first branch of this formulation, that quality of education should not be a function of parental wealth constitutes a direct threat not merely to differences among and local control in school districts but to private schooling, and indeed all family provided supplements to education. The second branch of this formulation, that seeking constitutionally to divorce educational quality from neighborhood characteristics, constitutes a threat not merely to existing systems of school financing but to the survival of the independent powers of local and, indeed, state governments as well as to rights of free association and migration.

These possibilities and dangers are not fanciful. The present school financing litigation is being coordinated throughout the country through the Lawyers Committee for Civil Rights under Law, assisted by the framers of the *Serrano* thesis, Professor Coons and his colleagues. The Assistant Director of the Lawyers Committee, Mrs. Sarah Carey, has outlined the impending attack on private schools:

> "(Mrs. Carey) Now if the constitution declares education to be a fundamental interest it might be you could attack private schools on that ground.
>
> (Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.
>
> (Mrs. Carey) That is right.
>
> (Senator Mondale) You might say that there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law. Go ahead.

[4] The *Serrano* court conceded "Plaintiff's contention — that education is a fundamental interest which may not be conditioned on wealth — is not supported by any direct authority." (487 P. 2d at 1255) It reached its conclusion in an opinion replete with quotations from the Coons book.

(Mrs. Carey) That is roughly what I wanted to say" (Mondale Committee Hearings at page 6884, Appendix C hereto) (App. 28a).

Dr. Coons has also suggested that in light of the fiscal requirements imposed by *Serrano*:

> "I think the amount that would already be taken in personal income and other statewide taxes for the general support of education would be enough so that most people would not be able to afford the support of public education and private education. * * * *And of course, it is up to the state as to whether they can do that.* The state, after all, would set some kind of adequate minimum which every child should have available in public education. A district would have to stay in the system." (Mondale Committee Hearings pages 6883-84, Appendix C hereto) (emphasis added) (App. 27a).

Other writers have acknowledged that there is little stopping place in plaintiffs' logic short of compulsory state-run boarding schools on the early Soviet model. See Kirp, *The Poor, The Schools and Equal Protection*, in Harvard Educational Review, *Equal Educational Opportunity* (1969), at 155-56. It is integral to the *Serrano-Rodriguez* principle that local school districts are to be forceably prevented from spending additional funds on education beyond those authorized by the State.[5]

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[5] Professor Coons, in a minor qualification of this, has proposed a system of "power equalizing" which would allow districts to supplement state authorized funds from local property taxes provided that rich districts surrendered a portion of the taxes raised for this purpose to the poorer districts. He has acknowledged "of course, there are certain problems inherent in that, not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000, it may raise $1,500. It is cosmetically bad politically." (Mondale Hearings (App. 24a) page 6882). Even this largely cosmetic modification of the equal-spending rule has drawn violent criticism from some zealots for ju-

The effect of the principle and its allied conception of education as a "fundamental interest" is to proclaim that education is so "fundamental" that parents and local governments must be prevented from spending their money on it. "The application of this principle to all areas of consumption would do away in effect with income differences, destroying the whole system of incentives on which every society is founded." Coleman, Preface to Coons, *Private Wealth and Public Education* (1969) at XIV. See Simons, *Economic Policy for a Free Society* (1948) at 28-29:

> "A society based on free responsible individuals or families must involve extensive rights of property. The economic responsibilities of families are an essential part of their freedom, and like the inseparable moral responsibility are necessary to moral development. Family property in the occidental sense of the primary family, moreover, is largely the basis of preventive checks on population and of the effort to increase personal capacity from generation to generation, that is, to raise a few children hopefully and well or to sacrifice numbers to quality in family reproduction."

Counsel associated with the committee coordinating the *Serrano-Rodriguez* litigation have not merely acknowledged its relevance for family-provided supplements to education, but also its implications for the remaining other powers of local government. Thus Mrs. Carey has told us that the rule sounds the doom of the locally collected and locally assessed property tax:

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dicial intervention in these matters. See Wise, *The California Doctrine*, Saturday Review, November 20, 1971, 78 at 82; Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harvard Law Review 7 at 54-59 (1970); President's Commission on School Finance, Schools, People and Money, Final Report (1972) at 33. In light of this, the *Serrano-Rodriguez* principle realistically viewed, demands full state funding, or at least fully state controlled funding, as a matter of constitutional compulsion.

"The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed." (Mondale Committee Hearings at 6867) (App. 11a).

Further, once the fundamental objective of the proponents of this litigation is achieved — a declaration from the court that education is a "fundamental interest" — a further wholesale assault on state treasuries will begin:[6]

"And then finally — and this is an issue the press has ignored totally — if education is a fundamental interest, as the *Serrano* court declared it to be, what flows from that? * * * There are a whole lot of things in different directions that flow from the finding of fundamental interests. In other law suits which raise the point directly — which this case didn't —it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest the same as a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids. Ultimately, five or ten years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas." (Mondale Committee Hearings at page 6868) (Testimony of Mrs. Carey) (App. 12a).

Still others associated with this litigation have noted that the implications of this case are not confined to education but extend to all the surviving powers and responsibilities of state and local government, and indeed to the

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[6] In *Spano v. Board of Education*, 328 N.Y.S. 2d 229, 234 (Sup. Ct. Westchester Co. January 17, 1972), the court, in declining to follow the *Serrano* and *Rodrigues* cases, perceptively referred to them as "exercises in a forensic 'game plan' ".

federal budgeting process. Thus Professor Coons has expressed the view that the cases render constitutionally vulnerable such programs as the federal impacted area aid program. (Mondale Committee Hearings, at 6848-49). Further, we are told:

> "*Serrano* 'opens a very large door', says John Silard, a Washington, D. C. attorney involved in school tax litigation. For the first time, he says, the courts are requiring 'equal protection' in public programs. They are holding states accountable for how and where they spend public money. In his view, this means 'a revolution in public services, the schools, he predicts, are merely 'the first bite at the big apple. Welfare obviously comes next, and I guess health, too.' * * * Some lawyers predict that if education is accepted as a fundamental interest, other public services are bound to follow. But they don't like to say it out loud. 'They want this to stick', one attorney says. 'You stress that education isn't like garbage. We are playing a game here. You have to (in order) not to frighten the courts away from a proposition that's sound.'" Andrews, *Tax "Revolution"*, Wall Street Journal, March 13, 1972, pages 1, 12.

Nor is this all. Professor Coons and his collaborators have included in their book an appendix entitled "The State — Nation analogy to the District — State picture", suggesting a constitutional obligation to equalize educational spending in all states. Coons, et al., *supra* at 465-68. Indeed the assumed constitutional requirement of *Serrano* and *Rodriguez* of a relationship between benefits and taxes jeopardizes not merely finance systems for various public services, state and national, but all regressive taxes (the sales tax, the property tax, etc.), all regressive expenditure programs (expenditures for national parks and for higher education, for example), and all association of regressive taxes with regressive expenditures (e.g. use of

a cigarette tax for purposes of higher education and the catalogue of other examples contained in Mr. Justice Cardozo's opinion in *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937)). Such are the implications of the principle at issue in this case.

STATEMENT OF FACTS

In the brief compass of an amici curiae memorandum in support of a jurisdictional statement, a comprehensive statement of the facts of *Rodriguez* is not in order. A number of features of the case should, however, be noted.

1. The case followed, and in large measure uncritically relied upon, the decisions of the Supreme Court of California in *Serrano v. Priest* and of Judge Miles Lord in the United States District Court of Minnesota in *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). Indeed the *Rodriguez* opinion is inconsistent with a prior order by one of the members of the *Rodriguez* court in *Guerra v. Smith*, (W.D. Tex. No. A-69-CA-9), appeal pending, handed down on July 20, 1971 prior to the *Serrano* and *Van Dusartz* cases (Appendix A hereto). The opinion of the California court in *Serrano* is representative of that court's unrestrained approach to equal protection cases. See *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P. 2nd 487, unanimously vacated 403 U.S. 915, invalidating a two-thirds majority requirement for school bond issues.[7] The opinion rested in

[7] Notwithstanding this unanimous reversal, the California court relied on its own opinion in *Westbrook* as precedent for *Serrano*, 487 P. 2nd at 1249. This court in *Gordon v. Lance*, 403 U.S. 1 clearly rejected the proposition that educational finance was a fundamental interest activating a strict equal protection standard-a proposition urged upon it by the appellees and by the National Education Association as amicus curiae in *Gordon v. Lance*. The pertinence of *Gordon v. Lance* and of this Court's decision in the *Westbrook* case for Serrano-type litigation has been acknowledged by one of the leaders of the Lawyers' Committee for Civil Rights sponsoring the present school financing litigation, Herschel Shanks, Esquire. (See Appendix D, 57a).

large measure upon cases and doctrines peculiar to California and was discounted in advance by Professor Coons and other proponents of the *Serrano* principle. See Coons, Clune and Sugarman, *op. cit. supra* at 452. The *Van Dusartz* case, the first intervention by the federal judiciary in these matters, was decided barely a month after its filing, by a procedure characterized by successful counsel as a 'nonappealable declaratory judgment' upon preliminary motion, after thirty minutes of oral argument, upon fragmentary briefs, on the day of the convening of a special session of the state legislature.

Upon this fragile judicial foundation, a vast superstructure of propaganda has been erected in recent months.

2. The *Serrano* opinion totally failed to cite, and the *Van Dusartz* opinion cited only to disparage, this Court's recent and clearly relevant opinions in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *James v. Valtierra*, 402 U.S. 137 (1971). The *Rodriguez* opinion, true to form, failed even to cite either of these cases (to which may now be added *Lindsey v. Normet*, 40 L.W. 4189). As recognized by the court in *Spano v. Board of Education*, 328 N.Y.S. 2d 229 (Sup. Ct. Westchester Co., Jan. 17, 1972), the *Serrano* and *Rodriguez* decisions misconceived and disregarded this court's decisions in *McInnis v. Ogilvie*, 394 U.S. 322 (1969) and *Burruss v. Wilkerson*, 397 U.S. 442 (1970) in both of which cases the so-called 'Serrano principle' was urged upon this Court in the briefs of parties and amici curiae, including Professor Coons, and in both of which summary affirmances over dissent resulted.

3. None of these opinions cite or even consider the principles relating to taxation and benefits enunciated by Justice Cardozo for this Court in *Carmichael v. Southern Coal Company*, 301 U.S. 395 (1937).

4. The Rodriguez court totally failed to consider and discuss the problems of federal jurisdiction presented by the claims asserted before it including the following problems, all related to the refusal of courts to interfere with state taxing and budgetary decisions:

a) the problems presented by the Tax Injunction Act, 28 U.S.C. Section 1341, see *Samuels v. Mackall*, 401 U.S. 41 at 66 (1971); *Lynch v. Household Finance Co.*, 40 L.W. 4335, 4337 n. 6 (Sup. Ct. March 21, 1972) and authorities there cited;

b) the problems presented by the fact that the only pecuniary interest at issue was essentially that of state taxpayers in light of *Lynch v. Household Finance Co.*, 40 L.W. 4335, 4337 n. 6; *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo.), aff'd 373 U.S. 241 (1963); *Grey v. Morgan*, 371 F. 2d 172 (7th Cir. 1966); *Hornbeak v. Hamm*, 283 F. Supp. 549 (M.D. Ala. 1967), aff'd 393 U.S. 9 (1968); and the Fifth Circuit's own decision in *Bussie v. Long*, 383 F. 2d 766 (5th Cir. 1967);

c) the problems presented by the limited scope of 42 U.S.C. Section 1983, see *Snowden v. Hughes*, 321 U.S. 1 (1944); *Board of Education of Muskogee v. State of Oklahoma*, 409 F. 2nd 665 (10th Cir. 1969); *McMillan v. Board of Education*, 430 F. 2nd 1145 (2nd Cir. 1970) (Friendly J.); *Griffin v. Breckenridge*, 403 U.S. 88, 102 note 9 (1971); and *Adickes v. Kress and Company*, 398 U.S. 144, 167 note 39 (1970). See also Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, (2nd Edition 1967) at 1435.

The substantiality of these jurisdictional questions has been acknowledged even by counsel associated with the Lawyers' Committee for Civil Rights in a memorandum filed in court as an exhibit by plaintiffs in *Milliken v.*

Green, a school financing case pending in Michigan. (Appendix B hereto).

d) Further, the *Rodriguez* court did not consider the applicability of the abstention doctrine, in light of this court's clearly revelant decision in *Askew v. Hargrave*, 401 U.S. 476 (1971);[8]

e) In addition, the *Rodriguez* court did not consider the general question of lack of federal equity jurisdiction that the absence of viable remedies presents. See *McInnis v. Shapiro*, 293 F. Supp. 327, 335-36 (N.D. Ill. 1968) aff'd 394 U.S. 322 (1969); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583 at 597-98, 600; and see the Mondale Committee Hearings, *Supra* at Part 16 B., pages 6747-48.

f) Nor were questions of justiciability considered, notwithstanding *Gordon v. Lance*, 403 U.S. 1, 6 (1971); *James v. Valtierra*, 402 U.S. 137, 142 (1971) and the *McInnis* and *Burruss* cases.

g) In addition, there was no discussion of the applicability of the Eleventh Amendment. See *Great No. Life Ins. Co. v. Read*, 322 U.S. 47, 51-52 (1944); *Georgia Ry. Co. v. Redwine*, 342 U.S. 299, 304 n. 15 (1952); *Employees of Dept. of Public Health v. Dept. of Public Health*, 452 F. 2nd 820 (8th Cir. 1971).

5. The procedure followed in determining these grave questions, including the allowance to plaintiffs of leave to file a lengthy last minute affidavit containing numerous factual allegations and the disallowance to defendants of

[8] Even Mr. Shanks of the Lawyers' Committee for Civil Rights has acknowledged that this court's decision in *Askew* puts the *Rodriguez* plaintiffs out of federal court. (Appendix D, *infra.*, p. 60a).

an effective opportunity to controvert the affidavit failed to comport with the principles of this court's decision in *Askew v. Hargrave.*

6. The delayed injunction entered by the court has a generality and breadth violating the requirements of Rule 65 (d) of the Federal Rules of Civil Procedure, derived from Section 13 of the Clayton Act, providing that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail * * * the act or acts sought to be restrained'. See *Gunn v. Committee to End the War*, 399 U.S. 383, 388-89 (1970); *International Longshoremen's Association v. Philadelphia Marine Trade Association*, 389 U.S. 64, 74-76 (1967); *Watson v. Buck*, 313 U.S. 387 (1941). In addition it should be noted that the delayed injunction ordered defendant state officials to reallocate the funds available for financial support of the school system "including without limitation, funds derived from taxation of real property by school districts" notwithstanding the fact that the school districts whose funds were being reallocated were not parties to the suit. This element of the court's order is patently violative of Rule 65. "No court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. * * * This is far from being a formal distinction; it goes deep into powers of a court of equity. * * * It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst

fears of those who are jealous of its prerogative." *Alemite Manufacturing Corporation v. Staff*, 42 F. 2nd 832 (2nd Cir. 1930) (L. Hand, J.).

7. Subsequent to the rendition of its opinion the *Rodriguez* court passed a subsequent order purporting to exempt from its decree payments for debt service. No rationale was tendered for distinguishing between such payments and other vested obligations such as payments under teacher contracts in "wealthy" districts.

ARGUMENT

1. The burden of plaintiffs' complaint is not that the state has not equalized but rather that it has not equalized enough. Insofar as the relief sought is directed against the use by local school districts of the proceeds of local property taxation, the complaint is founded not on state action but upon the failure of the state to correct consequences of differences in private wealth. The very title of the Coons work acknowledges this. The equal protection clause and Section 1983 "was [not] meant to provide a remedy in circumstances where the state had failed to take affirmative action to prevent widespread private discrimination", nor are these provisions available to rectify "the inaction implicit in the failure to enact corrective legislation". *Adickes v. Kress and Company*, 398 U.S. 144, 167 note 39 (1970).

2. There is nothing unconstitutional about permitting revenues to be spent where they are raised. See the discussion in *Muskogee v. Oklahoma*, 409 F. 2nd 665 (10th Cir. 1969).

3. There is no classification on the basis of wealth at issue but merely a normal consequence of the division of

the nation into state and local governments. As a Professor Emeritus of Public Finance at Princeton has noted:

> "It comes as quite a shock to be told that the property tax, workhorse of the tax system, is unconstitutional after so many years of reliable service. * * * The 'rich' and 'poor' municipality must levy different rates of property tax for the support of all other local functions, but apparently the disparities of tax rates for these purposes are still constitutional; moreover, every state provides more or less state aid to local schools. * * * Mother Nature is primarily responsible for the differences in real property values * * * topography, location and other natural features result in value differences that cannot be eliminated. A given millage levy will obviously produce more revenue for a governmental unit that contains high value property than it will for a unit that contains low value property. It would be as reasonable to hold that the Rocky Mountains are unconstitutional because they are not flat enough to plow as it is to indict the property tax because a given rate of tax will not produce the same revenue in every district * * * we may not have to wait long before some court will decide that a low income family is denied equal protection of the law because it can buy less than another family with more income. Inequality of personal income would then be unconstitutional." Lutz, *Can the Property Tax be Replaced?* Wall Street Journal, February 9, 1972, page 14.

On its face the Texas system of school financing imposes no wealth classifications. Any distinctions which exist relate not to the wealth of individuals but to the average wealth of subdivisions, average wealth not necessarily coinciding wth average income because of commercial and industrial property and the fact that persons can be property-rich and income-poor and vice-versa. The statutes make no distinctions among individuals based upon their wealth. Even if they did they would not be unconstitutional in a nation the Fifth and Fourteenth Amendments

to whose constitution protect private property. Education is no more a fundamental interest than health, welfare, police protection, sanitation, or virtually all save the most ephemeral activities of local government. The fact that it is an important governmental function does not warrant the application of a strict standard of review with respect to non-racial distinctions in its finance, unless it is to be supposed even with respect to fiscal matters that legislatures exist only to decide unimportant questions. Nor does this case involve state-imposed criminal disabilities and deprivations of liberty and procedural due process to which the Fourteenth Amendment is directly addressed or the First Amendment and voting rights questions vital to the survival and functioning of the political process as to which strict judicial scrutiny may be appropriate. The present case is not an effort to protect the political process but to remove one of the most important areas of public policy from political decision making.

4. The decision of the court below rests upon presuppositions as to the relationship between educational expenditure and educational quality that are contrary to the best available evidence on the subject. See Coleman, et al., *Equality of Educational Opportunity*, (1966) (the so-called "Coleman Report" published pursuant to the terms of the Civil Rights Act of 1964, finding negligible relationship between educational cost and educational quality); Central Advisory Council on Education (of Great Britain) *Children and Their Primary Schools* (Two volumes 1967) (the so-called Plowden Report also finding no significant relationship between educational accomplishment and educational spending and class size); and see President's Commission of School Finance, *Schools, People and Money, Final Report* (1972) at X-XI and 59. ("The relationship between cost and quality in education is exceedingly com-

plex and difficult to document. Despite years of research by educators and economists, reliable generalizations are few and scattered * * * The conviction that class size has an important or even a measurable effect on educational quality cannot be presently supported by evidence.") In light of such findings Texas and other states have not acted irrationally in declining to appropriate the approximately 8 billion dollars per year necessary to raise all school districts to the level of the higher districts in each state. Nor have they — or the President's Message to Congress of March 16, 1972 — been irrational in regarding other social needs, including concentration of additional available funds on truly needy urban districts and such other programs as higher education, welfare, and mass transit as deserving of higher priorities. It is not the function of courts to choose between competing objects of public expenditure or competing educational theories. The effect of the present decisions if generally followed will be to precipitate fiscal crises first for state governments and for presently "wealthier" local districts and second and derivatively for the federal government, and to detract from the ability of all governments to address other pressing social problems. The compelling interests of the state are apparent.

5. Only a brief summary can be given of the other objections to the Draconian decree of the Texas court. The court's principle that educational differences between separate governments must be justified by a "compelling interest" would lead to efforts constitutionally to compel the national government to relieve interstate differences. It would open to constitutional attack the federal impacted area aid program, among other programs. It would open to attack any disparity in spending between different schools in the same district and result in judicial second-guessing of the detailed administration of local school sys-

tems. It would open to constitutional attack government programs relating to medical care, higher education, police funds, transportation funds and library funds. It would result in a shift in legislative struggles from struggles between subdivisions in a country whose political constituencies have been, with good reason, geographically rather than functionally defined, to struggles between program and program and social class and social class. There is no reason to believe that these struggles will be less divisive; rather the contrary. The *Rodriguez* rule may precipitate a flight to private education in the formerly "wealthy" districts. Local fiscal control of schools will be eliminated or greatly curtailed with resulting implications for educational policy and with resulting increasing use of the schools as instruments for political change.[9] Great difficulty will arise in taking account of variations in local needs and costs. The writings of proponents of judicial intervention indicate that the courts will inflict upon themselves not merely a generation of litigation but litigation in perpetuity. Judicial intervention will result in a welter of conflicting legal commands, state, federal and local, and resulting financial crises and school closings. Intervention will result in massive immediate increases in education costs similar to those that have taken place in New Brunswick to the detriment of the state's capacity to address other problems.[10] Any flight to private schools in wealthier districts will decrease the political attractiveness of increased educational appropriations in the future since the public schools would lose part of their most articulate constituency. The relief sought may result in

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[9] See Coleman, *The Struggle for Control of Education*, in Bowers (ed.), *Education and Social Policy: Local Control of Education* 64, at 77-78 (1970).

[10] See Advisory Commission on Inter-Governmental Relations, *Who Should Pay for Public Schools?* (1971), Chapter 1.

use of non-property taxes and in either substantially lower property taxes resulting in windfalls for commercial and industrial enterprises and land speculators or a possible shift to more regressive sales and value added taxes. The claims rest upon premises as to the desirability of educational levelling that are not universally shared, since even the disadvantaged may benefit from the consequences of a measure of educational inequality or the existence of bellwether school districts. The *Rodriguez* rule would lead to evasions by local subdivisions by transfer of educational functions to other agencies such as library and park boards and/or to a proliferation of the *Rodriguez* principle as these evasions are pursued. The *Rodriguez* rule will prevent introduction of innovations commanding local but not statewide or national support, as has already begun to happen in New Brunswick, and will in the end result in a reduction in society's total expenditures for education and in the total investment by the older generation in the education of the younger.[11] The underlying principles of *Rodriguez* cast in jeopardy the entire federal and state budgeting process, and presuppose constitutional limitations on regressive taxes and expenditures and "unfair" relationships of tax and expenditure that do not exist and have never been held to exist. The principle advanced is inconsistent with the delegation of powers to local government and with local home rule and will, if accepted, have consequences for differences in regulatory legislation between home rule subdivisions and differences in the legislation of states exercising power delegated to them by

[11] "The history of education since the industrial revolution shows a continued struggle between two forces; the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. Neither of these desires is to be despised, they both lead to investment by the older generation in the younger." Coleman, Preface to Coons, *supra* at vii.

Congress. The principle advanced will impair the tradition of close fiscal accountability of local boards of education and will in large cities terminate a process which hitherto has given varying racial and ethnic groups a voice in fiscal control of their educational system.

It has hitherto been thought to be an advantage of our system of government that states and localities are not precluded by the absence of a national majority or by the lack of means to carry out reforms on a national scale, from addressing needs that command majority support in their own jurisdictions. Similarly it has been thought to be an advantage of our system of government that local governments may address needs not recognized by a statewide majority without being open to charges that their greater means or interest constitutes a denial of equal protection of the laws. It has also been thought to be an advantage of our system that private individuals including private individuals of comparatively modest means can spend funds for social purposes not recognized by a majority at even the local level. Plaintiffs' premises about equality in education are sharply at odds with these principles, and will make educational change in the future dependent upon statewide or even national majorities.

6. As in all the school finance cases decided to date plaintiffs failed to serve with the complaint the real parties in interest in the litigation — those school districts that would be disadvantaged by adoption of the *Serrano-Rodriguez* rule. The court did not direct that notice be given to such school districts; in consequence no such districts intervened and the adversary process which would have operated in the event that such districts, or some of them, had been parties to the case did not come into operation, to the detriment of the quality of the record

and the presentation of the case for the present system of school finance. Integral to the relief that plaintiffs propose is the prevention, or at least substantial burdening, of additional local educational expenditures in so-called "wealthier" districts. Integral to it also is an immediate and artifically generated demand for massive public expenditures on abstract equalization of rural areas at a time of other more real and pressing social problems.

The *Rodriguez* decision is a recipe for a society in which political controversies are fought out at ever higher levels for ever higher stakes, by ever more violent means and in which the safety valves inherent in federal, pluralistic, and limited government will have been constricted to the point of extinction. Reached by processes and in reliance upon case authorities which cannot command considered approval, unsupported by substantial study or reasoning and based upon strongly disputed educational theory, neglectful of the jurisdictional limitations which history has imposed upon the powers of federal courts and all courts of equity, it constitutes an interference by the judiciary with the legislative power of the purse running counter to seven centuries of Anglo-American history. It constitutes an unparalleled affront to the fundamental principles of government of a nation whose very Declaration of Independence contains a remonstrance against a ruler with life tenure who "has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation for imposing taxes on us without our consent".[12]

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[12] See Hazard, *Social Justice Through Civil Justice*, 36 U. Chi. L. Rev. 699, 710-11 (1969).

CONCLUSION

In light of the failure of the *Rodriguez* opinion to cite or even consider this court's opinions in *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937); *Dandridge v. Williams*, 397 U.S. 471 (1970); *James v. Valtierra*, 402 U.S. 137 (1971); and *Samuels v. Mackall*, 401 U.S. 41 (1971) and in light of its clear misconstruction of the effect of this court's summary affirmances in *McInnis v. Ogilvie*, 394 U.S. 322 (1969) and *Burruss v. Wilkerson*, 397 U.S. 442 (1970), its failure to give effect to this court's pertinent decision in *Askew v. Hargrave*, 401 U.S. 476 (1971), and its failure to discuss applicable jurisdictional limitations, summary reversal, and not merely notation of probable jurisdiction, is in order. *United States v. Haley*, 358 U.S. 644; *United States v. Ohio*, 385 U.S. 9.

Respectfully submitted,

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APPENDIX A

United States District Court
Western District of Texas
Austin Division

A-69-CA-9

Janell Guerra, et al.

v.

Preston H. Smith, et al.

ORDER

Plaintiffs, as a class of students and taxpayers, seek a declaratory judgment to the effect that the Texas educational financing scheme is unconstitutional because it violates their constitutional right to equal protection of the laws under the Fourteenth Amendment in two respects: (1) Plaintiffs receive a substantially inferior education than do students in many other districts because of a lack of funds; (2) Plaintiffs must pay a substantially higher tax rate because of the low property value in their school district, while still having less money per pupil to spend.

While the extensive exhibits which the Plaintiffs presented at hearing persuasively indicate that the State is not providing substantially equal educational opportunities to all its citizens, this Court can afford no relief. McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd sub. nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969), held that

> There is no Constitutional requirement that public school expenditures be made only on the basis of pupil's educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student.

This Court considers that binding upon the determination of the instant action.

Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted be, and is hereby, GRANTED. The above styled case is DISMISSED.

Entered this 20th day of July, 1971, in Austin, Texas.

JACK ROBERTS,

United States District Judge.

APPENDIX B

Lawyers' Committee
For Civil Rights Under Law

Suite 520—732 Fifteenth Street, Northwest
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Phone (202) 628-8730

To: Attorneys Interested in School Finance Litigation

From: R. Stephen Browning [initials]

Subject: Request for Pleadings

Date: October 29, 1971

As of Tuesday, October 26, 1971, I have been notified of the suits listed on the attached sheet. If your suit is not on my list, please notify me at once and send me a copy of your complaint. If your suit is on the list, please check to see that I have all the pleadings. If I don't, please send me everything I am missing.

I am also enclosing a very timely memorandum prepared by Michael A. Wolff, the lead counsel for the Minnesota case. Van Dusartz v. Hatfield. I suspect you may find Mr. Wolff's conclusions to be helpful in developing your litigation strategy.

Hope this is helpful, and please send me at your earliest convenience those pleadings that I lack from your case.

RSB:JAB

Enclosures

State Name	*Case Caption*	*Pleadings on File at the Lawyers Committee*
Arizona	*Hollings v. Shofstall*	Complaint only (filed 10/12/71)
California	*Serrano v. Priest*	Complete pleadings file, except October California Supreme Court opinion amending the August 30th decision
Colorado	*Allen v. Otero*	Complaint only (filed 9/3/71)
Illinois	(a) *Blase v. State of Illinois*	Complaint only (filed September ?, 1971)
	(b) *Scarboro v. State of Illinois*	Complaint only (filed October ? 1971)
Indiana	?	No complaint received (filed October ?, 1971)
Maryland	*Parker v. Mandel*	Complaint only (filed October 1, 1971)
Michigan	(a) *Detroit Board of Education v. State of Michigan*	Complaint only (filed 6/19/68)
	(b) *Milliken v. Green*	Complaint only (filed 10/15/71)
Minnesota	*Van Dusartz v. Hatfield*	Three complaints filed — consolidated into one decision (October 12, 1971)
New Jersey	*Robinson v. Cahill*	Complaint only (filed 2/17/70)
New York	?	No complaint received (filed by Michael Richmond in Westchester County, October ?, 1971)
Texas	(a) *Fort Worth Independent School District v. Edgar*	Complaint only (filed 1969 (?)) and plaintiff's trial brief)
	(b) *Guerra v. Smith*	Complaint (filed 1/28/69) and complete pleading file up to order by Judge Roberts (1/20/71)
	(c) *Rodriquez v. San Antonio Independent School District*	Third Amended Complaint (filed October ?, 1968)

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October 21, 1971

Mr. R. Stephen Browning

Lawyers Committee for Civil Rights
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Dear Steve:

Following Jack Coons' suggestion, more or less, I have done some inquiry and research concerning school-financing cases in federal court. I conferred with Professor David Louisell, a Berkeley colleague of Jack's who is visiting professor at the University of Minnesota Law School, and read some cases and textual materials. I apologize that I have not the time to write this as a thorough memorandum of law; however, in this letter I shall try to outline briefly the points of law involved, tactical considerations, etc., with the hope that such information will be useful to other lawyers who have brought or plan to bring their school-financing cases in federal court. The answers given here are by no means final; the points conveyed here should be used as a starting point for lawyers' research.

1. *Jurisdiction.* In our case, *Van Dusartz v. Hatfield* (D. Minn., Oct. 12, 1971), the plaintiff schoolchildren's cause of action arises under the Civil Rights Act, 42 U.S.C. 1983, in

that the schoolchildren in poor districts are deprived of equal protection guaranteed by the 14th Amendment by the fact that educational expenditures, and thus quality of education, were lower because of their districts' inability to raise greater sums of money from local property taxes. Jurisdiction in such 1983 actions is based on 28 U.S.C. 1343 (3) and (4). The legal theory, propounded by the Court in *Serrano* and accepted by the Court in *Van Dusartz*, is that education is a fundamental right and that classification on the basis of wealth is constitutionally suspect.

We believe that in federal court actions, the only viable cause of action is the above-described schoolchildren's cause of action. Taxpayers, parents, school districts, local governments, etc., would have great difficulty invoking jurisdiction. Section 1983 and the 14th Amendment do not seem to reach such purely fiscal problems. Nor does 28 U.S.C. 1331, the general federal question statute, confer jurisdiction both because of the 14th Amendment-reach problem and because, as to individual taxpayers, the amount-in-controversy problem.

2. *The McInnis Problem.* *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Oglivie* (394 U.S. 322 (1969) and *Burress v. Wilkerson*, 310 F. Supp. 572 (W.D.Va. 1969) *aff'd nom.* 397 U.S. 74 (1970) preclude cases brought that are based upon the educational needs of the children. This problem is discussed at great length elsewhere (Coons et al., *Private Wealth and Public Education*). However, it needs to be emphasized that, despite the fact that the U.S. District Court in *Van Dusartz* ably distinguished *McInnis* and *Burress*, the greatest danger to cases brought in federal courts is that the courts will consider *McInnis* and *Burress* to be binding precedent. Not every court will be willing, as the Minnesota federal court was, to draw the kind of fine line needed to distinguish *McInnis* and *Burress*. For that reason alone, these cases generally should be kept in state courts.

3. *The Abstention Problem.* In *Askew v. Hargrave*, 401 U.S. 476 (1971), the Supreme Court indicated that the ab-

stention doctrine might apply to cases in this area. If there is an action pending in state court which would obviate the need for consideration of federal claims in federal court, the Supreme Court indicated that the U. S. District Court might very well abstain. The language of the Court in *Hargrave* should give pause to those who would bring their actions in federal court. For one thing, if a complaint bases its claims alternatively or primarily on grounds involving state laws or constitution, a federal court might abstain until the state courts have ruled on such issues.

Basing a plaintiff's complaint, as we did in *Van Dusartz*, solely on the claim of deprivation of civil rights in the denial of equal protection might protect against federal court abstention, but there is no assurance that it will. See *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), *McNeese v. Board of Education*, 373 U.S. 668 (1963) and *Monroe v. Pape*, 365 U.S. 167 (1961).

4. *Declaratory Relief Only.* In *Van Dusartz*, we asked only for a declaratory judgment declaring that the constitutional rights of the plaintiff schoolchildren are being violated by the state's system of school financing. By doing this, we avoid a three-judge court. The case law is nearly unanimous that where only declaratory relief is sought, a three-judge court cannot be convened. *Fremed v. Johnson*, 311 F. Supp. 1116 (D.C. Colo. 1970, three-judge court) at p. 1118, footnote 7 summarizes the cases on point. See also *Mitchell v. Donovan*, 398 U.S. 427 (1970), where the Supreme Court said that denial of a declaratory judgment was not the same as denial of injunction under 28 U.S.C. 1253 which permits direct appeal to the Supreme Court.

There are two clear advantages to this approach: 1.) If relief is denied, appeal is to the Court of Appeals. Thus, we avoid repeating the disastrous result of a summary affirmance as in *McInnis*. 2.) Declaratory relief arguably is a much more modest request than to ask a federal court to enjoin the operation of a myriad of statutes and to compel the Legislature to establish a non-discriminatory sys-

tem. The latter request would seem to many courts to be nonjusticiable, as the courts for many years considered reapportionment cases.

The objection can be raised, of course, as to what happens if the Legislature refuses or fails to heed the declaratory judgment of the federal court. We believe the appropriate time to be concerned about this is when it happens: In other words, plaintiffs are in a much better position after a declaratory judgment has been entered to move to amend their complaint and seek a three-judge court to enjoin the statutes. To move at the outset for a three-judge court to make sweeping changes in the financing system is to ask the court to bite off more than it probably feels it can chew.

5. *A Motion to Dismiss.* As the *Van Dusartz* case indicates, probably the best thing that can happen to your lawsuit is for the defendants to move to dismiss for failure to state a cause of action. Then the claims of the plaintiffs are in roughly the same posture as in *Serrano* which arose on a demurrer. In *Van Dusartz*, Judge Lord assumed the truth of plaintiffs' allegations in testing the cause of action. Thus he in effect said that if plaintiffs' allegations are true, the financing system is unconstitutional.

What the Judge really has done is issue a "declaratory judgment" that is nonappealable. His opinion came at a time when the Legislature was meeting to consider school financing. The opinion sets forth a constitutional standard that must be followed. This advice is given in a memorandum and order denying a motion to dismiss; from this order, no appeal can be taken without the court's approval. See *Moore's Federal Practice*, Para. 12.14 n.16. If the Legislature satisfies the standard set forth, the litigation will be ended without any appeal because of mootness. Whether this result can be reached is uncertain but it clearly is worth a try.

6. *A Nonappealable Declaratory Judgment?* In drafting our complaint, we tried another device that we hoped might avoid an appeal if declaratory relief were granted to us. In our prayer for relief, we asked the court merely

to enter an order declaring that the system violated the constitutional rights of the plaintiffs and retaining jurisdiction of the case until the Legislature responds to such declaration in order to determine what further relief (i.e. convening of a three-judge court would be appropriate. However, such retention of jurisdiction would not be effective to deprive the defendants of their right to appeal; the declaratory judgment statute (28 U.S.C. 2201) clearly states that "any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." Clearly, to proceed in this manner in order to avoid appellate review is fruitless.

As I said at the outset, this letter is not intended to provide definitive answers to the problems facing litigants in federal court; it may, however, be used as a starting point for lawyers' research. In that regard, I hope these thoughts will be helpful.

Very truly yours,

MICHAEL A. WOLFF,

Attorney at Law.

MAW:bme
cc: Prof. John E. Coons
Prof. David Louisell

APPENDIX C

(6866)

STATEMENT OF MRS. SARAH CAREY, ASSISTANT DIRECTOR, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

(Mrs. Carey) Thank you. My point of view in discussing the *Serrano* decision is that of an organization that has been coordinating and stimulating similar kinds of lawsuits around the country, and in many cases being involved in litigation ourselves.

I think at the outset I should state that the impact of *Serrano* has been absolutely phenomenal. In a way that far exceeds the limited nature of the decision. It is, as the professors have pointed out, a decision of the California Supreme Court, not the U.S. Supreme Court. It will apply to California only if it passes a whole series of remaining judicial proceedings.

Yet, despite these various restrictions, it has had at least as much impact, if not more, than a number of the major U.S. Supreme Court decisions in past years.

I think, trying to explain the reaction — you have touched on it earlier, Senator — that the whole spirit of this Nation has been that (6867) we are committed to a universal, equal form of education that helps all children, poor or rich. And then, suddenly we find out through this decision and the resultant publicity that, in fact, we are not doing that; we are providing education resources very much along class lines and discriminating against those who need it the most.

That is just a preface.

The *Serrano* decision has been a real mindblower in terms of the issues it has raised and the activity it has provoked, legislative and legal.

Similar Suits Filed in 26 States

At our latest count, we figured that something like 43 attorneys in 26 States have either filed or are planning to

file similar kinds of lawsuits. There is a great danger, as Professor Coons has mentioned, that some of these suits will not be adequately prepared and could prejudice the consideration of the issues by the Supreme Court.

(Senator Mondale) There is a conference scheduled on October 16.

(Mrs. Carey) That is a conference the lawyers committee is sponsoring, and we are trying to pull together—

(Senator Mondale) In Washington.

(Mrs. Carey) That is right. But, as you probably know, lawyers are difficult to control. They hide behind their clients.

(Senator Mondale) I was once a lawyer myself.

(Mr. Carey) I would like to point out that our feeling is that the *Serrano* case has raised more questions than it has answered. It is very exciting in that respect, in terms of ushering in an era of reform that will challenge the educational establishment.

Many of the questions that it raises are touched upon by the other suits that are now pending. I would like to just briefly summarize these questions, and then run through the three major categories of lawsuits that are now pending, so you have an idea of some of the issues being presented.

Three Major Questions Raised

Serrano set a negative standard. It did not say what the State had to do. It just said what it could not do; and, in so doing, it raised a number of very complicated questions, including what ought to be done about the property tax.

The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed.

The second major question is: Should school districts be redrawn? The *Serrano* decision indicates that as long as the inequalities in resource allocation among districts are corrected, there is no need to alter present district boundaries.

(Senator Mondale) It could well be that that judgment, if sustained, would have a bearing politically in the long run about how school district lines are drawn.

(Mrs. Carey) That is right. In a number of cases now pending, the plaintiffs request redistricting as a means of sharing the wealth among various units of government.

The third one is — well, I guess, Professor Yudof has really taken care of this issue — how can intradistrict discrimination be prevented, once (6868) the money gets handed down by the State, assuming the State corrects its allocation pattern?

And then finally — and this is an issue the press has ignored totally — if education is a fundamental interest, as the *Serrano* court declared it to be, what flows from that?

In the criminal area, where the right to an adequate defense, has been declared a fundamental right, the Supreme Court has held that the State has to put the defendant in a position where he can actually fully exercise that right. This has been translated to mean if he is poor he must be furnished defense counsel; his trial transcript must be paid for; and he must be given other support to put him in an equal position with more well-to-do citizens.

Serrano Decision Deals with Fiscal Equity

(Senator Mondale) As I understand Dr. Coons' interpretation of the *Serrano* case, the court specifically was not asked to deal with the question of need; they were asked to deal with the question of what he calls "fiscal equity." So in no way does that deal with the need question. But there have been two cases, in Virginia and Illinois which sought to deal with the fairness principle, the need principle and both were lost.

(Mr. Carey) I am getting at it from a different way. The *Serrano* decision did declare education to be a fundamental interest, and it said, as a result of that, we have to do certain things with the way we spend money for education, But there are a whole lot of things in different directions that flow from the finding of fundamental interest.

In other lawsuits which raise the point directly — which this case didn't — it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest, the same way a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids.

(Senator Mondale) I understood Dr. Coons to say he hopes no one would bring a lawsuit of that kind now.

Did I understand you correctly?

(Dr. Coons) Yes, sir.

(Mrs. Carey) Dr. Coons does not want to have *Serrano* fouled up on its way to the Supreme Court.

(Senator Mondale) That is going to be quite a conference in October.

(Mrs. Carey) Ultimately, 5 or 10 years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas.

To get a little more specific on these questions, I would like to outline the kinds of cases that are now pending.

Questions on Property Tax

In the property tax area, there are a number of suits, a whole line of new law, that in effect are challenging the way jurisdictions assess and administrate their property taxes. As you probably know, nationwide around half of school funds are funded through the property tax. The tax generates $33 billion, which makes it second only to the Federal income tax and the Social Security Tax. And

yet, the (6869) manner in which it is administered in most states is an outrage. It is steeped in corruption and subject to tremendous political abuse.

Even though State constitutions generally define the level of required assessment, this varies tremendously locally, so even though a State may require in its constitution assessment at full market value, the local assessors will be assessing anywhere from 5 to 10, to 25 percent of value.

Many States — and Illinois, Indiana, and Wisconsin are among the worst — have such a proliferation of assessing districts, with elected assessors who are untrained and unscrutinized and unreviewed by State agencies that they are literally tied into the local political system which negates effective assessment. Further, the number of tax exemptions granted have gone way out of control.

In Boston and in other major cities where the exempt private and public property cuts severely into potential tax bases — the loss that results from this maladministration of property taxes hits the schools the hardest, although it affects other local services.

The National League of Cities and the U.S. Conference of Mayors has estimated that maladministration of the property tax costs the cities between 30 and 50 percent of their total potential revenues.

This could mean that — in a city like Newark, the loss through the city's failure to administer the property tax properly is greater than the funds it gets through Title I, ESEA. So the Federal program, in effect, is merely making a dent in the misfeasance of local officials.

In regard to the cases that are pending, there is a major case in Texas involving as plaintiffs the school districts of Fort Worth, Dallas, and Houston. These school districts are claiming that the manner in which Texas assesses taxes is so divergent, from district to district, that they are being assessed at three or four times the amount of neighboring districts — which are being assessed below the statutory

level. That, since the State contribution to the local schools depends on the value of the property assessment in the district, they are getting hit on the other end, too. More is being taken from them and less being given back as a result of the way their properties are being assessed.

They also claim that the tax exemptions from State and Federal buildings in their jurisdictions — and these are facilities which benefit the State as a whole and not just the locality — also cut unfairly into their revenues and discriminate against them by imposing a higher tax burden.

The Fort Worth case is before a three-judge Federal court in Texas and has survived a motion to dismiss; presumably it will be decided sometime this fall. It points up very directly the second phase of the *Serrano* effort. A State may take the step that California appears to be taking, of cleaning up the manner in which it distributes its revenues once they have been collected, but, unless it also cleans up the way in which the revenues are collected, it will be hit by a second equal protection suit down the road.

This summer in June a Federal court in Alabama considered a similar issue. Schoolchildren in that case claimed that inequities in the administration of the property tax — from 6 percent of market value to 26 percent of market value — deprived them of much needed resources for their school. In other words, because the State assessors were not following the statutory level of 100 percent, they were, in (6870) effect, cutting into the school budget by several million dollars. This was the first case to hold that under the Federal Constitution that kind of divergence in the administration of property tax violates both the due process and the equal protection clauses.

The property tax reform effort is a movement that must be watched. It is really another part of the kind of thing *Serrano* is trying to accomplish.

Questions on Effects of Revenue Sharing

I think without going into it too specifically that there is clearly a Federal role in this area. If the Federal Government is going to accept some form of revenue sharing, then the funds generated under that program should not be handed out unless the States are willing to clean up their own tax mess, and, in effect, reform the property tax and other laws that generate taxes.

As I understand it, neither S. 1669 or H.R. 7796, the special revenue-sharing bills for education, includes any such provisions at present.

Suits Seeking Redistricting

A second line of cases, which is of tremendous relevance to where we go in education and what happens with school finances, are the suits that are seeking redistricting. These suits have two goals. Some of them have a fiscal goal. The plaintiffs are asking that their school district be merged with a richer neighboring district in order to share the wealth. These suits have a second goal sometimes, the separate, distinct goal of seeking desegregation of what have become racially segregated districts.

While *Serrano* promises to eliminate economic distinctions betwen rich and poor districts, this line of cases seeks to redraw district lines altogether, so you can merge rich white communities with poor minority communities. As far as school reform movement is concerned, it seems clear these suits can only provide a temporary form of relief; sooner or later there is going to have to be an overhaul of the State laws to provide for a greater State contribution. But in the short run the suits may help integrate the poorer school districts with their richer neighbors and get some additional funding into them.

To touch on the cases briefly, one of them is pending in Federal court in Texas: *Rodriguez v. San Antonio Independent School District*. In the San Antonio area, the school districts have been drawn with great skill so the

Chicanos are in one area and the whites are in another. The suit alleges that the higher the white population, the more money available. They are asking for alternative relief, either a correction of the fiscal distribution at the State level, or redistricting so that the Edgewood School District, in which the plaintiffs live, would be merged with a nearby richer district.

(Senator Mondale) I think they have something like 12 school districts within the city of San Antonio, each separately funded. And, in addition, the city fathers put all the public housing in the Edgewood School District. They are located next to an Air Force base. The children all go by Edgewood, they go somewhere else with their impact aid. The superintendent of Edgewood testified before us.

(Mrs. Carey) The San Antonio case is probably one of the worst ones. But it is clear the power to develop school districts has been greatly (6871) abused, in the same way zoning laws have been exercised to exclude poverty sectors or predominantly minority sectors.

A second case that is presently pending is the one in Richmond, Va., which I am sure everyone has read about. This is a case that follows an initial order from a Federal court ordering the city of Richmond to desegregate its schools. The plaintiffs came back a few years later and said, "Court, we cannot desegregate; the only way we can effectively integrate is by merging with the counties." The courts brought in the surrounding counties as defendants and is presently considering a metropolitan redistricting scheme. The *Richmond* case alleged both racial discrimination and the discriminatory exercise of State districting powers which resulted in the distribution of school resources of an unequal basis. There are several similar suits, one in New Jersey, *Robinson v. Cahill.*

There is one pending in Hartford, Conn., *Lumpkin v. Dempsey;* where the city of Hartford is claiming the only way you can integrate education is by reaching into the surrounding counties.

In Wilmington, Del., and Grand Rapids, Mich., there are suits similar to the *Richmond* suit, where an initial desegregation order was granted, and the plaintiffs came back for further relief, saying it is impossible to desegregate unless we join the surrounding areas as defendants.

(Senator Mondale) Do you think those cases are likely to be successful, in the absence of evidence of discrimination and segregation in the development of the lines themselves?

(Mrs. Carey) That is the issue that is being litigated, whether or not there was discrimination in the drawing of those lines. Of course, the *Detroit* case, from what the press says — which may or may not be accurate — seemed to find there was State action in the zoning practices and the way that resources were allocated.

(Senator Mondale) Within the district?

Metropolitan Desegregation Cases

(Mrs. Carey) Within the city. But also suggesting the only way — the State has the power in the entire metropolitan area, naturally, since it controls cities and can take away their powers and give them additional power. But that court seemed to be saying that the State is responsible because the situation resulted from the delegation of its zoning and financing powers.

The metropolitan desegregation cases, which are also growing in number very rapidly, raise important questions that relate to *Serrano*.

Among these are — and these are questions, I think, the committee should consider — have the States overdelegated their districting powers in such a manner as to become unwitting accomplices to local discrimination? Can the districting mess be cleared up by a simple reallocation of resources? Will the *Serrano* principle, with its elimination of economic distinctions between districts encourage in areas of de facto racial segregation a system of separate but equal schools, in effect ignoring the principles enunci-

ated 15 years ago in *Brown v. Board of Education*? Can the schools be equal if they are racially segregated? And, finally, will the remedies fashioned on the basis of *Serrano* include integrated classrooms as part of the definition of "equalization of resources"?

(6872) These are all questions way down the road. But, in the two lines of cases, each take care of only part of the problems. *Serrano* really does only get at the fiscal problem, and the metropolitan desegregation ones get at the racial issues. It would seem, unless the two are combined in some manner, we are not going to fulfill our constitutional principles.

Some of the language in the first *Hobson* decision, I think, illustrates the problem that *Serrano* could lead to, of separate but equal schools where you would make funding, the allocation of funding sufficiently equal to meet the constitutional standard, and yet the communities would still remain segregated.

The final line of cases I wanted to touch upon very briefly are the remaining school cases which more or less seek the same goals as *Serrano*. Professor Yudof has already touched on the intracity suits, and there is one in Chicago, one about to be filed in San Francisco, and another about to be filed in New York. Intracity discrimination is, again, a pattern across the country. These cases all reflect very real personal situations.

Relationship of Wealth to Educational Achievement

There are, among the post-*Serrano* cases, cases that are going a bit further in terms of raising additional related issues. The case filed initia[illegible] Detroit School Board, which was dropped — which we [illegible] about to be reinstituted — attempted to deal with one of the questions raised by *Serrano*, which is the relationship, if any, that wealth has to actual educational achievement.

I think many of the journalists raised this question. If you keep on increasing the money, can you really make

a difference in education? Aren't these children so disadvantaged that pouring more money isn't going to make any difference?

Well, the *Detroit* case tries — through a massive study based on Michigan school data — to show that there are very direct correlations between the resources provided to a school, the background of the children, and educational achievement. There are figures showing that educational achievement does at least correlate with the money invested. And, finally, the study shows the relationship of all of this to career opportunities. As we understand it, this case is going to attempt to bring to proof—

(Senator Mondale) Where is that case? Did I understand from your testimony that the plaintiff's case in Michigan was dropped?

(Mrs. Carey) It was dismissed for lack of prosecution, but it is going to be reinstated.

(Senator Mondale) This is the Urban Coalition case?,

(Mrs. Carey) It is the case for which the Urban Coalition did a study.

(Senator Mondale) Yes, I read the study. I thought it was going forward. I was surprised to hear it had been dropped.

(Mrs. Carey) Detroit got so involved in other issues that the school board did not pursue it.

But these suits are going to be moving into some of these areas of proof that raise still more questions.

Based on this background, I would like to suggest a number of actions that the Federal Government should consider.

(6873) There is, from our point of view, a tremendous need of research and hard data on which to base the various remedies that are being recommended. Such questions as the cost of municipal overburden, the differentials between city and suburban areas, are not too difficult to an-

swer. The ACIR has taken care of a lot of that. But there are very basic questions about the real costs of educating children that nobody knows about, and perhaps if the Office of Education could develop a 5- or 10-year research plan that could direct itself to this problem, it would help the results of these cases.

(Senator Mondale) I agree that we ought to have a much better and more sophisticated program of research and experimentation. But I think, if we have a 10-year plan, the Congress would await the results of that study before it helped schoolchildren. There would be one more generation down the drain.

Need Long-Term Commitment

(Mrs. Carey) Some form of long-term commitment. The performance contracts, for example, that some cities are turning to really should be watched closely from the Federal level so that other States can benefit from them if they actually work.

(Senator Mondale) I agree with you.

(Mrs. Carey) The present measurements are also focused so much on the speed, on the efficiency with which the child is moved, through the system rather than the end result, the learning.

As I think has been touched upon by the professors, I think that a lot of things ought to be done about Title I.

If the *Serrano* movement really takes fire and the legislative renaissance that Professor Coons has predicted takes place, there is clearly going to be a gap period between the time when the States assume their responsibilities and the present. During that time Title I really should be used to help make up the differences in the needs of poor students in the inner city.

Beyond that, if the States do really correct their financing schemes, Title I should probably be used as a source of funds for continuing experimentation with regard to the educational needs of the poor.

An additional action that we have kicked around that might be useful at some point — would be some kind of special Federal legislation that would give individuals the right to serve as enforcement tools in seeing that the States comply with the equal allocation of resources requirement. We felt perhaps something along the lines of the Voting Rights Act, that would put in the office of the Attorney General and in the hands of private individuals a right to enforce compliance with the constitutional standards established by *Serrano*. I think that is quite a way down the road, but those kinds of enforcement efforts, where you allow private individuals to do what the Federal Government may not do, even though it is its duty, are really tremendously helpful in moving in this kind of area.

One final comment. We have found in following these suits that many of them are outrageously expensive. Reform litigation, particularly litigation that is massive, can be extraordinarily expensive. Legislative action is far more efficient, less patchwork, and really can do the job faster.

(6874) Just to give you a specific example, the suit that was brought in the District of Columbia to enforce the initial decision in the *Hobson* case, that is, the followup suit, has cost, if you include attorneys' fees, somewhere around $200,000 to $300,000 for the appellants alone. So that is something that must be kept in mind. Marvelous as the constitutional issues are for lawyers, they are almost prohibitively expensive.

[Written Prepared Statement Omitted]

(6881) (Senator Mondale) Thank you very much for a most useful statement.

We will take about a 10-minute break here, and then I have some other questions.

(Recess.)

(Senator Mondale) Dr. Coons, in your statement you set forth a formula that you think might be used, for example, in California, based on the *Serrano* principle. On

pages 7 and 8, you have an example of how California might respond to the *Serrano* rule and equalize the financial power of each school district.

Would you describe that for the record, if you will?

(Dr. Coons) Basically, the idea is to provide each district with the same opportunity and capacity to spend so that, irrespective of whether districts were par in taxable wealth, that the tax rate locally chosen would have the same effect as it would everywhere else in the State.

For example, if the poorest district in the State were to tax itself at 33 mills, hypothetically, and the richest district were to tax itself 33 mills on its local property, that each would have the same number of dollars per pupil to spend.

It could be thought of rather simply, as a table of equivalents. The legislature might enact a table of equivalents in which the left side is a column of permissible tax levies, locally chosen by the local board ranging, let's say, from a minimum of $600 or $700 up to a maximum of, say $1,800. For each amount that the district might choose to spend on its students, there would be an appropriate local tax levy. Let's say that for 2 percent a district would be permitted to spend $1,000 per pupil. If the 2-percent levy did not raise that much locally, that district would then be subsidized to the extent of the difference. If it raised more in a rich district, the excess over $1,000 would be redistributed to pay for the poorer districts.

(Senator Mondale) So, under that formula, the poorer the district, the more subsidy; the richer the district, perhaps the greater it would subsidize others?

Equality of School District's Effort

(6882) (Dr. Coons) That is correct. But, in any event, for each and every tax rate, the same spending would be permitted so that there would be an equality of sacrifice among the districts for any given level of expenditure. If you want to spend more, you have to try harder. That is the ethical principle that is involved.

(Senator Mondale) So, the political effect would be that a poor district could not go out and campaign for a higher effort, since there will be a nice bundle of State money coming in to match the district's effort, because its valuation is so low that even though it tries, it cannot obtain adequate funds from local sources. The State will make up the difference between the $400, say, it raises per capita and the $1,400 developed in the State formula. The district will get $1,000 per head from the State government.

(Dr. Coons) Exactly.

(Senator Mondale) But there is just the reverse incentive, however, for the rich district. Are the politicians there going to say, "Let's try harder so more of our money will go somewhere else." And how is that going to work?

(Dr. Coons) We have no idea.

(Senator Mondale) How would you like to try it?

(Dr. Coons) I would like very much to.

It seems to me, looking at today's pattern of spending, Senator, we see poorer districts trying much harder than rich districts. We see them willing to tax themselves to the bone in order to support spending at one-third of one-fourth of the level of the rich districts.

Rich districts are in the habit of saying, "Look how much we care about education; we spent so much here." It would be interesting to find out whether they really do care and are willing to tax themselves at the same rate as the poor districts for that same level of expenditure.

Of course, there are certain problems inherent in that, not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000, it may raise $1,500. It is cosmetically bad politically.

(Senator Mondale) You would get a big meeting the night you proposed that.

(Dr. Coons) Right. There are, however, ways to diminish this highly visible redistribution.

One of them is first to remove industrial and commercial property from the local tax base — a form of legislation which has been frequently suggested, anyway, and one which is inherently rational.

Tax Industry/Commerce Statewide

That is to say, take a statewide tax of 3 or 4 percent and apply it to all industrial and commercial property. The local levy then would only be on residential property. And the range of wealth among districts would have been squeezed to such a narrow spectrum, compared to the present spectrum, that there would be no problem of recapture.

(6883) If you took all the industrial and commercial wealth out of Beverly Hills and the other rich districts in California, the range of local residential wealth per pupil would be sufficiently narrow that you could operate the kind of system that I outlined in my testimony, without having to take any money away from Beverly Hills. That, it seems to me, would be a highly desirable political apparatus.

(Senator Mondale) In the absence of some kind of adjustment, in the rich district, would you not actually be encouraging private schools for the rich? Would they not say, "Well, we are in this trap where we can raise a lot of money to be sent elsewhere, or we can put downward pressure on revenue for our local schools and simply spend all of our money on private schools for our children." Since all the capital costs of constructing private schools is deductible from the taxes anyway, it is sort of publicly supported.

In other words, I am trying to think how the incentives of your program would work. I see the one point you make.

Would not a statewide income tax make more sense than trying to depend principally upon the real estate tax or some other form?

(Dr. Coons) Let me say this, that a statewide income tax could certainly be employed either in a centralized or a decentralized manner to provide the necessary funds. There is no question about that.

If you are asking, in a decentralized model, should a local income tax be preferred over local property tax, the answer is likewise "Yes," in my view. Because it seems to me that the income tax—

(Senator Mondale) I am talking about a statewide income tax.

(Dr. Coons) You could have both, as a matter of fact. No reason you could not have both.

(Senator Mondale) The income tax has additional advantages. I think it is a better reflection of wealth than a property tax.

Prefers Local Income Tax

(Dr. Coons) At least as the property tax is presently structured, there is no question, and that is why we would prefer a local income tax.

May I answer that other question which you had before about the rich district and its disincentives? It is an important question.

It depends entirely upon the formula adopted. That is to say, if the relationship between spending and tax is carefully adjusted, and, if industrial and commercial are removed from the local tax base so as to squeeze the wealth spectrum down, it is my judgment that there is no stage at which you would have a powerful incentive for rich districts to opt out of the system. But I think the amount that would already be taken out in personal income and other statewide taxes for the general support of education would be enough so that most people would

not be able to afford both the support of public education and private education. At least there would not be a sufficient number of such people that there would be any but a fringe of districts in which the demography would be such that there would be so many very rich people that they would opt out of public education altogether.

And, of course, it is up to the State as to whether they can do that. The State, after all, would set some kind of adequate minimum which every child should have available in public education. A district could (6884) simply drop out, as it were; it would have to stay in the system. Being in and paying for that system, people are going to use it — they are going to have to carry the burden of that local system, and so, there is a powerful incentive to stay in it and make it all work as a public system.

Was I responsive?

(Senator Mondale) Yes.

Would either of the other two witnesses care to respond to this question of what the States should do if the *Serrano* principle becomes law?

(Mrs. Carey) I have a couple of comments on the basis of what Professor Coons has said.

I think the issue you have raised about income taxes is a key one. The experts on property tax, who I gather you are hearing next week, all can tell you how this tax can be administered in a progressive manner, but they cannot point to any community where it is being so administered. So, we have all bought that mythology for 10, 20, or 30 years, and the evidence is piling up that, perhaps the property tax cannot, in fact, be a progressive tax. This would be a strong persuasion for income tax.

On the suggestion of removing industrial and commercial properties from the local assessment base, I think it would meet with tremendous resistance from the industrial and commercial interests. They have no desire at all to be assessed and taxed at the State level. You look at

United States Steel in Gary, Ind., they would fight it tooth and nail to prevent Indianapolis from doing the assessment, as opposed to the local assessor, who works part time for them.

On the private school issue, that is one that everyone kicks around. As a factual matter, I am not sure there's any difference right now between the Scarsdale school system and Scarsdale with a private school system. It is just the admission practices that are slightly different. At present it is a question of buying a house rather than getting into a school.

So, I am not sure that will change things from the way they are at present.

Are Private Schools Nonprofit?

Another thing to consider is whether, if private schools are actually set up as nonprofit corporations and so on, whether there would not be grounds for attacking them. There is a case, a Lawyers Committee case in Mississippi, *Green v. Kennedy,* where white parents tried to set up a school, a private school, for the purpose of avoiding integration, and the court knocked down their tax exemption on the ground that it was a deliberate evasion of the constitutional mandate.

Now, if the Constitution declares education to be a fundamental interest, it might be you could attack private schools on that ground.

(Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.

(Mrs. Carey) That is right.

(Senator Mondale) You might say there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law.

Go ahead.

(Mrs. Carey) That is roughly what I wanted to say.

APPENDIX D

Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?

Hershel Shanks*

The California Supreme Court handed down a decision last Fall which, if made applicable to other states of the Union, will require a thorough revamping of education financing laws in all states except Hawaii.[1]

The California Court held for the first time that a state educational financing system which requires local school districts of varying wealth to raise even a part of their own education funds from local property taxes violates the equal protection clause of the Fourteenth Amendment. This result followed, said the Court, because such a system discriminates on the basis of wealth in the distribution of educational resources. To the extent the local school district is required to assume the burden of supporting its public schools from its own taxes, the poorer districts are unable to provide the same level of financial support as their richer neighbors, even though the poorer district often impose on themselves higher tax rates than wealthier districts. Thus the educational opportunity — at least in economic terms — available to any child within the state depends on the wealth of the district in which he lives. "[S]uch a system cannot withstand constitutional challenge and must fall before the equal protection clause."[2]

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[1] Hawaii already has a single unified school district.

[2] *Serranto v. Priest,* L.A. No. 29820, California Supreme Court, August 30, 1971, slip op. 2. On October 12, 1971, a federal district judge in Minnesota, relying on the *Serrano* decision, came to the same conclusion. *Van Dusartz v. Hatfield,* No. 3-71 Civ. 243 (D. Minn.). This ruling came in a denial of a motion to dismiss. The Court will retain jurisdiction but defer further action in the case

California's School Finance Formula

The California system for financing public education is typical of that which prevails throughout the United States. About one-third of the support for the public school system comes from the State. Over one-half is provided by local property taxes imposed by local school districts. Six percent comes from federal funds, and the remainder from miscellaneous sources.

State aid consists of two types of grants from the State to the local school district. The first type is known as the flat grant and consists of a payment to the local school district of $125 per pupil. It is distributed on a uniform per pupil basis to all districts, irrespective of their wealth. The flat grant constitutes about half of the funds distributed by California to its local school districts.

The second type is an equalization grant intended at least partially to ameliorate the disparities arising out of the differing abilities of districts of varying wealth to support local schools from local taxes. The equalization grant assures that every school district regardless of its poverty will have available to it a certain minimum amount per pupil — $355 for each elementary school pupil and $488 for each high school student. This minimum amount would supposedly fund a so-called minimum "foundation program".[3]

To compute the size of the equalization grant, two items are subtracted from the minimum foundation program amount: (1) the State's flat grant and (2) the sum the local school district is expected to raise from its own taxes. The remainder is the equalization grant per pupil. In other words, the equalization grant consists of $355 for each elementary school pupil and $488 for each high

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pending action by the Minnesota legislature, so the ruling is not presently appealable. Since the *Serrano* decision, approximately 30 other states have filed or are considering filing *Serrano*-type suits.

[3] In fact, far more is needed per pupil to fund an adequate program.

school student less the $125 flat grant and less a hypothetical amount which would be raised by minimal local tax rates — 1 percent in elementary school districts and .8 percent in high school districts.[4] In practice, however, only the poorer districts receive equalization grants under this formula. For the wealthier districts, the flat grant of $125 plus minimal local taxes raises more than the minimum foundation program amount.

While equalization grants are to some extent equalizing in their effects, the flat grant is anti-equalizing. For the poor district, the flat grant is essentially meaningless because anything taken away from the flat grant would be made up by an increased equalization grant of the same amount. The flat grant could be repealed without having any effect on the poor district. This is of course not true of wealthier districts who do not get an equalization grant. If the flat grant were repealed, the wealthier districts would lose $125 per pupil. Accordingly, the flat grant actually widens the gap between rich and poor districts.

The result of the California system of educational financing — partially because the equalization grant does not go nearly far enough and partially because of the anti-equalizing effects of the flat grant — is a wide variation in per pupil expenditures from the poorer to the wealthier California school districts. Thus, the Baldwin Park Unified School District in Los Angeles spends only $577 to educate each of its students. By contract, the Beverly Hills Unified School District, also in Los Angeles, spends $1,231 per student.

The fundamental injustice underlying this system is highlighted by the fact that the tax rate in Beverly Hills is just over 2 percent, while the tax rate in Baldwin Park is more than 5 percent. Thus, Beverly Hills can raise far more per pupil with far less effort than Baldwin Park.

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[4] California also has an additional State program of "supplemental aid" which is available to subsidize particularly poor school districts which are willing to make an extra local tax effort by setting their tax rates above a certain statutory level.

The source of the disparity in per pupil funds available to the two districts is clear: The assessed valuation per pupil in Beverly Hills is thirteen times more than the assessed valuation per pupil in Baldwin Park. The assessed valuation per pupil is $50,885 in Beverly Hills and $3,706 in Baldwin Park.

The Court found "irrefutable" the contention that the foregoing system classifies students on the basis of the wealth of the district in which they happen to live. Indeed, "[t]he wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures."[5]

Requirements Under *Serrano*

Assuming that this decision becomes the law of the land, what are its implications for educational financing and public education administration?

It is of course clear that such a decision would require the revamping of educational financing systems throughout the country. But beyond this lie a number of questions. Will compliance with this decision require, or lead to, state control, if not actual operation of, local schools? In other words, does this decision spell the end of the local school district, locally controlled? Does the decision mean the end of local property taxes as a source of revenue to support public education? Does the decision require 100 percent state financing of public education? Does the decision require equal dollar expenditures per pupil for each student within a state?

Many educators and even some lawyers have assumed that the answer to all of these questions is "yes". In fact, however, the answer to all of these questions is "no". It is therefore important, at the outset, to understand what compliance with the decision will, and will not, require.

The contention that the decision will result in state control and perhaps even state operation of local schools —

[5] Slip Op. 240.

and thereby doom the local public school — is based on the assumption that the decision will require 100 percent state financing of public education. The argument is that whoever pays the piper will call the tune. Yet the assumption is incorrect. To be sure, a state *may*, but need not, comply with the decision by a system in which the state provides all of the funds for the public schools on a per pupil basis. But even if a state were to adopt a 100 percent state financing as its method of compliance, this would not necessarily mean state operation or control of local schools. Even now, local school districts are creatures of the state, created by state legislatures, and subject to all valid rules and regulations which the state legislature may decide to adopt. A state has the right under the present system of school financing to control or operate the local public schools. But in fact states have not done this, despite the fact that they provide a very substantial part of the local school districts' educational budget.

It could, of course, be argued that if states were to supply 100 percent of the local school budget, they would be more inclined to control the operations of the local school districts. This seems doubtful. Given the long history of doggedly independent local school control and operation, it is unlikely that the states would undertake to exert substantially more control over local school systems simply because the extent of their financial support of these systems increases from, say, 40 percent to 100 percent. But, in any event, the signal point to keep in mind for this purpose is that 100 percent state financing of public education is not required by the decision.

Whether state educational financing systems may still rely on local property taxes, and, if so, whether at varying tax rates, locally determined, require a somewhat fuller discussion of the Court's reasoning.

The evil which the Court found in the present system is that to some extent the number of dollars available per pupil in any given school district depends on the wealth — as measured by the assessed valuation per pupil — within that district. The Court condemned the *relation* between

educational offering (at least as measured in economic terms)[6] and *wealth* (as measured in assessed valuation per pupil). That is all the Court condemned. Compliance with the Court's decision requires only that there be a divorce in this relationship of wealth with educational offering. The Court did not say *how* the divorce shall take

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[6] Whether per pupil expenditures are in fact closely related to educational offering of educational achievement has been hotly debated since the Coleman Report's finding that "differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude." (James S. Coleman, et al., *Equality of Educational Opportunity* [Washington: U. S. Government Printing Office, 1966]). Other distinguished critics question this finding. See Guthrie, Kleindorfer, Levin & Stout, *Schools and Inequality* (1971) and Bowles, "Towards Equality of Educational Opportunity", 38 Harv. Ed. Rev. (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969). Although a definitive answer may not be available, it is difficult to disagree with Henry S. Dyer, who writes:

> We strongly suspect that the amount of money spent on instruction can make a considerable difference in the quality of pupil performance, but how the funds are deployed and used probably makes even more of a difference. It seems reasonably clear that the effectiveness of schools is very largely a function of the characteristics of the people in them — the pupils and their teachers — but we are still a long way from knowing in useful detail what specific changes in the people or in the educational mix will produce what specific benefits for what specific kinds of children [Dyer, "School Factors and Equal Educational Opportunity", 38 Harv. Ed. Rev. 38 (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969)].

Nevertheless, it is difficult to imagine a court denying equal funds to the poor because differences in per pupil expenditures have not been shown to make a difference. On the contrary, courts appear to have assumed that dollars will make a difference see *McInnis v. Shapiro*, 293 F. Supp. 327, 331 (N.D. Ill. 1968), *affirming mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 332 (1969); *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds, *sub nom. Askew v. Kirk*, 401 U.S. 476 (1971)), although successful, plaintiffs may find themselves put to the proof, see *Serrano v. Priest*, slip op. 26-27; *Hobson v. Hansen*, 269 F. Supp. 401, 437 (D.D.C. 1967), *affirmed sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969), and especially *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

place, or what systems of educational financing will meet this test of "non-relatedness of wealth and educational offering".

There are many ways of breaking this relationship which do not require abandonment of local taxes — even property taxes — as a source of support for local school systems. For example, a state could provide that $1,000 per student will be available in each district within a state and that the local district must raise as much of this amount as would be produced by a 2 percent property tax. If that would produce in any particular district less than $1,000 per pupil, the state would make up the difference. If such a tax would produce more than $1,000 per pupil, the excess would be required to be paid to the state. This is a true 100 percent equalization formula.[7]

The system just described breaks the relationship between wealth and educational offering, but it retains a significant reliance on local property taxes to support local schools. It may be argued, however, that this system, like the system in which the state provides all of the funds for local education, produces an educational straightjacket in which every school district is limited to $1,000 per pupil regardless of the importance which a particular local school district places on education and regardless of the effort which the residents of a particular district are willing to make to support their public schools. This is true, but the system may be varied so as to provide for different amounts depending on the effort (as expressed in its tax rate) the local district is willing to make to support public education. In other words, under the holding in the *Serrano* case, it is constitutionally permissible to allow a variation in educational offering to depend on

[7] In the example, the state *requires* the local district to impose the 2% tax on real estate. However, the state need not make this requirement: The local district may be permitted to raise the money any way it wishes — by a real property tax or by any other form of taxation. Or it may be permitted to raise less than the amount that would be produced by a 2% property tax, in which event the 2% property tax would be used only as a measure of the state's equalization obligation.

the effort the local district is willing to make. Remember that only disparities emanating from variations in wealth are forbidden by the *Serrano* decision.

Suppose the formula is varied somewhat, to provide a differential in per pupil expenditures available to any district based on variations in local effort (i.e., local tax rates). Consider a system which provides that for each mill of local tax imposed by the local district, the local district would receive $50 per pupil. If one mill of tax produces less than $50 per pupil, the state will make up the difference. If it produces more than $50 per pupil, the excess must be paid to the state. Under this system, the local district decides how many dollars per pupil it wishes to provide for public education. The greater effort it makes, as expressed in its tax rate, the greater per pupil expenditures it will have for its public education system. But the amount available to the local district does not depend on its wealth. A 30 mill tax will produce the same revenue per pupil ($1,500) in the poorest as in the wealthiest district. This system has been described as "district power-equalizing"[8] because under it each district has the same *power* to produce educational funds for its own local school system, regardless of its wealth.

However, there are likely to be vociferous political objections to a district power-equalizing system because of the effect of such a system on the wealthier districts.[9]

To understand where the political outcry will come from in any district power-equalizing scheme, consider the following scenario, which is summarized in Table I. Assume, as is now the case, that each district raises its own school funds through local taxation but, for simplicity, without any state contribution. Assume further that District B, the wealthiest district in the state, is five times as wealthy in assessed valuation per pupil as District A, the poorest

[8] See Coons, Clune & Sugarman, *Private Wealth and Public Education*. Cambridge: Harvard University Press (1971).

[9] However, such an effect necessarily results from any system which withdraws from the wealthier districts the advantages they previously had as a result of their wealth.

district in the state. District A imposes a 6 percent tax which produces $600 per pupil (1 percent tax = $100 per pupil). District B, however, imposes only a 3 percent tax, but this produces $1,500 per pupil (1 per cent tax = $500 per pupil). Now suppose (see Hypothetical 1 in Table I)

TABLE I

Present System

(Each District Retains What is Produced By Its Own Taxes)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil	Tax Rate		Expenditures
6%	=	$600	3%	=	$1,500

Hypothetical 1, Using A District Power-Equalizing System
(All Districts Raised to Level of Best System)
(1% Tax Rate = $500 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
3%	=	$1,500 (i.e., $300 in local taxes and $1,200 state grant)	3%	=	$1,500

Hypothetical 2, Using A District Power-Equalizing System
(1% Tax Rate = $250 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
6%	=	$1,500 (i.e., $600 in local taxes and $900 state grant)	3%	=	$750
			or		
			6%	=	$1,500

that this hypothetical state decides to comply with the *Serrano* decision by a district power-equalizing formula. One way to do this would be to provide that any district which taxes itself at the rate which District B presently

taxes itself will receive just as much money as District B. In other words, for each percent of tax imposed by the local district, the state will insure that the district will receive $500 per pupil. The effect of this district power-equalizing formula is to raise the entire state to the level of the wealthiest district, provided only that the other districts make the same effort (by imposing the same tax rate) as the wealthiest district. In the case of District A, it could reduce its tax rate from 6 percent to 3 percent and increase its per pupil expenditure 2½ times, from $600 to $1,500. District B would retain its present tax rate of 3 percent and present per pupil expenditure of $1,500.

The problem with this district power-equalizing formula is that it is enormously expensive and is likely to be regarded politically as prohibitively expensive. The total cost, the politicians will say, is too high.

The state will then consider a district power-equalizing system that is pegged at a lower level (see Hypothetical 2 in Table I). The state will insure that the local district will receive, not $500 for each percent of tax it imposes, but $250. (Anything raised in excess of $250 for each percent would of course be paid to the state). This is all right with District A, the poorest district in the state. District A retains its 6 percent tax rate and, instead of having $600 per pupil, it will have $1,500 per pupil. However, District B now has a serious problem which is politically powerful residents are not likely to welcome. If District B retains its present 3 percent tax rate, it will find that it now will receive only $750 per pupil instead of the $1,500 per pupil which was previously produced by a 3 percent tax rate. If District B feels strongly that it does not want to lower the per pupil funds available to it for public education, as it is likely to feel, it will be faced with the prospect of doubling its tax rate from 3 percent to 6 percent in order to retain the same per pupil expenditure. In short, District B will either have to increase its tax rates substantially or decrease the quality of education it provides for its children. This is the fly in the political ointment of district power-equalizing. However, from a constitutional

point of view, this result follows only because District B no longer has an advantage because of its wealth.

Some argue that the result of the *Serrano* decision will be the destruction of the public school system. Whether the state adopts a district power-equalizing system or 100 percent state financing, it is unlikely to raise the level of all systems to that of the best. The result will mean a lowering of the quality of our best schools. No longer will they serve as the beacon light for the future. All those who have been accustomed to a higher level of educational quality are likely to abandon the public schools if they can afford it.

Others argue, with at least equal persuasiveness, that a judicial command to remove the disparities attributable to wealth will vastly improve the overall quality of the schools, without eliminating either diversity or freedom to experiment. These people argue that as a practical or political matter those citizens who control both the public schools and the legislatures, supported by the broad middle class who are entirely dependent on those schools, will make a new effort to aspire to the best for all, once they realize that even the wealthy can have the best only if it is also available, assuming equal effort, to the poor.

In exploring the latitude in devising school financing systems which is still available under the *Serrano* decision, it is clear that variations in per pupil expenditures are permitted if they result from variations in effort or tax rate exerted by the local district. However, differences in per pupil expenditures may be made to depend on a number of factors in addition to variation in effort. This, of course, follows from the fact that the *Serrano* decision forbids only variations which stem from differences in wealth. Accordingly, state financing systems may, consistent with the *Serrano* decision, permit differences in per pupil expenditures resulting from a host of variations in educational needs. High school students, for example, may be given more than elementary students. Adjustments may be made for districts whose school population is geographically dispersed so as to give them special

transportation problems. Other reasonable, and therefore allowable, adjustments might be made for the differential purchasing power of the dollar in different parts of the state, or the state formula may provide additional funds for any district willing to adopt and support special instructions or guidance programs.

In short, the latitude which remains after the *Serrano* decision is very wide indeed; the only thing that the decision condemns is wealth-related discrimination.

Will *Serrano* Become the Nation's Law?

The foregoing discussion was based on the assumption that the *Serrano* case would become the law of the land. We now turn to the question of how likely it is that this will occur. This question will involve a consideration of the history of the effort to obtain a judicial decree requiring the equalization of school resources, including the story of some litigation efforts that failed; a consideration of the constitutional theory on which the *Serrano* case rests, including its strengths and weaknesses; a consideration of whether the Supreme Court as now constituted is likely to be receptive to the position of the plaintiffs in the *Serrano* case, with special attention to straws in the wind provided by cases during the Court's last term; and finally to questions of judicial and litigative strategy which might affect the result in the United States Supreme Court.

In February 1965 a short notice by Arthur E. Wise entitled "Is Denial of Equal Educational Opportunity Constitutional?" appeared in *Administrator's Notebook*.[10] Although the subject generally was in the air,[11] this appears to be the first published suggestion that the present system of financing public education is unconstitutional. There followed a rash of articles, dissertations, books and book reviews — criticizing, developing, and sharpening the

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[10] Volume XIII, p. 1.

[11] See, *e.g.*, C. Benson, *The Cheerful Prospect: A Statement of the Future of Public Education* (1965).

analysis, and providing new materials and ideas.[12] Much of this scholarly output pointed to the conclusion that the present system of financing public education unconstitutionally discriminated against the poor.

Simultaneously with the publications, a number of lawsuits were instituted to test the validity of the proposition that the present system of educational financing was unconstitutional — in Michigan, Illinois, Virginia, California, Texas, and elsewhere.[13]

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[12] Horowitz, "Unseparate but Unequal — The Emerging Fourteenth Amendment Issue in Public School Education," 13 U.C.L.A. L. Rev. 1147 (1966); Wise, "The Constitution and Equality: Wealth, Geography and Educational Opportunity" (Univ. of Chicago, doctoral dissertation, 1967); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968), reprinted in C. Daly The Quality of Inequality: Suburban and Urban Public Schools, Chicago: Univ. of Chicago Press (1968); Kirp, "The Constitutional Dimensions of Equal Educational Opportunity," 38 Harv. Educ. Rec. 635 (1968), reprinted in Equal Educational Opportunity (1969); Horowitz & Neitring, "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State," 15 U.C.L.A. L. Rev. 787 (1968); A. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity, Chicago: University of Chicago Press (1969); Coons, Clune and Sugarman, "Equal Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Calif. L. Rev. 305 (1969); "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065 (1969); Kirp, Book Review, 78 Yale L. J. 908 (1969); Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969); Shanks, "Equal Education and the Law," 39 The American Scholar 255 (1970), reprinted in W. R. Hazard, Education and the Law New York: Free Press (1971); Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 Wisc. L. Rev. (1970); Coons, Clune & Sugarman, Private Wealth and Public Education Cambridge: Harvard University Press (1970); Shanks, Book Review, 84 Harv. L. Rev. 256 (1970); Goldstein, Book Review, 59 Calif. L. Rev. 302 (1971); Kaplan, Note, "Constitutional Law: Financing Public Education Under the Equal Protection Clause," 23 Fla. L. Rev. 590 (1971).

[13] Many of the cases are listed in Coons, Clune and Sugarman, *Public Education and Private Wealth*, p. 289 nn. 4-5.

The first case to reach judgment was the Illinois case, *McInnis v. Shapiro*,[14] in which a three-judge federal district court granted the defendants' motion to dismiss, thereby rejecting the equal protection argument advanced by the plaintiffs. Although the court found that "the inequalities of the existing arrangement are readily apparent,"[15] it concluded that the system was not entirely irrational. The Illinois statutes allowed local communities to control local schools, to experiment in educational financing and to determine their own tax burden in terms of the importance they placed on education. This gave the system sufficient legislative justification to sustain its constitutionality. Moreover, the court found that the judiciary was ill-equipped to order funds allocated on the basis of so nebulous a concept as "educational need," as was urged by the plaintiffs.

The *McInnis* decision was a serious setback, especially as it was a unanimous decision of a three-judge court. However, the Supreme Court still sat in Washington, and it was there that the plaintiffs promptly repaired.

However, the Supreme Court just as promptly dealt with the case by affirming, in a *per curiam* decision, on the basis of the jurisdictional statement filed by the plaintiffs in support of their appeal.[16] Apparently, the Supreme Court felt it could dispose of the case without benefit of briefs on the merits or oral argument.

Prior to the Supreme Court's decision in *McInnis*, the defendants in the Virginia case, styled *Burruss v. Wilkerson*,[17] presented a motion to dismiss to a single district judge who was thus required to rule on the substantiality of plaintiffs' constitutional contention. Without the benefit of the Su-

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[14] 293 F. Supp. 327 (N.D. Ill. 1968).

[15] 293 F. Supp. at 331. Per pupil expenditures varied between $480 and $1,000.

[16] *Sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969). Mr. Justice Douglas would have noted probable jurisdiction.

[17] 301 F. Supp. 1237 (W.D. Va. 1968) (denying motion to dismiss), 310 F. Supp. 572 (W.D. 1969) (dismissing the case after trial).

preme Court's ruling in *McInnis*, Chief Judge Dalton ruled that the question was substantial and that a three-judge court must therefore be convened:

> Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination. . . .[18]

A trial was had in the *Burruss* case and the facts established were even more appealing from the plaintiffs' point of view than those alleged in the *McInnis* complaint. Plaintiffs established that they were from a poor rural Virginia county and that their extreme poverty prevented them from providing an even marginally adequate school system, despite the fact that their school tax rates were unusually high and far in excess of many counties with well-financed school systems.

However, by the time the three-judge court in *Burruss* was ready to hand down its decision on the merits, the Supreme Court had already ruled on the *McInnis* case. Nevertheless the district court took the occasion in its opinion dismissing the complaint to observe:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid[19]

However, the Court found that

> The circumstances of [the *McInnis* case] are scarcely distinguished from the facts here[20]

Thus, the Court dismissed the case, but added

> While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help[21]

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[18] 301 F. Supp. at 1239.
[19] 310 F. Supp. at 574.
[20] *Ibid.*
[21] *Ibid.*

The *Burruss* court seemed to be inviting the Supreme Court to take another look.

So the *Burruss* plaintiffs also appealed to the Supreme Court. But the result was the same, a *per curiam* affirmance on the basis of jurisdictional papers without the benefit of briefs on the merits or oral argument.[22] If anything, the Supreme Court appeared to have "dug-in" by its decision in the *Burruss* case.

With two Supreme Court rulings against them, lawyers around the country who had been pressing these suits and exploring legal arguments to support them, paused for some serious stocktaking. A number of suits simply withered away. The Harvard Center for Law and Education, one of whose top priorities at its inception only a short time earlier had been to press equal education lawsuits, now turned its primary focus elsewhere. Interest in the issue lagged.

But for those who continued to press the struggle, a number of developments seemed to augur well. One was the expansion of equal protection doctrine in the Supreme Court itself. Shortly after its *per curiam* decision in *McInnis*, the Supreme Court articulated more explicitly and in greater detail than it had ever done before a new and far broader standard for judging the constitutionality of legislation subject to attack under the equal protection clause.[23] To appreciate this expansion of equal protection law, a short bit of background is necessary.

Chief Justice Warren has noted that

> The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.[24]

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[22] 397 U.S. 44 (1970). Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction.

[23] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[24] *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Or as Mr. Justice Harlan put it:

> The Equal Protection Clause prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected.[25]

Thus, though the equal protection clause does not prevent government from treating people differently, it does prevent different treatment which is not adequately justified or which is based on inadequate reasons. Accordingly, in any case where legislation is subjected to attack under the equal protection clause, the court must decide what is adequate state justification for the state's differing treatment.

Historically, adequate justification meant that the statute represented a reasonable means to accomplish a valid purpose. In order to mount a successful attack under the equal protection clause, a suitor had to establish that the distinctions embodied in the law were arbitrary and unreasonable. As the Supreme Court stated in a 1935 case, "A statutory discrimination will not be set aside as the denial of equal protection of the law if any state of facts reasonably may be conceived to justifiy it".[26] This has come to be known as the "rational basis" test.

In recent years, however, a stricter standard appears to have been applied in some cases. The emergence of this stricter standard began in cases where the Supreme Court declined to accept "any reasonable" justification for distinctions based on race. As early as 1944, the Court said that classification based on race were "suspect" and therefore had to bear a greater burden of justification.[27]

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[25] *Harper v. Virginia Board of Elections*, 383 U.S. 663, 681 (1966) (dissenting opinion).

[26] *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935); see also *McGovern v. Maryland*, 363 U.S. 420, 425-426 (1961) and cases there cited.

[27] *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Shortly after its decision in the *McInnis* case, the Supreme Court ruled more explicitly than it had ever done before that in certain cases reasonable justification was no longer enough to sustain a statute. In these cases, the standard of review was far stricter; differential treatment would be considered to be adequately justified only when the government convinces the Court that the differential treatment is *necessary to promote a compelling governmental interest.*[28] This has come to be known as the "compelling interest" test. Shortly thereafter, the Supreme Court made it clear that the stricter standard of review was applicable to cases involving discriminations based "on wealth".[29] The post-*McInnis* development seemed to bode well for another *McInnis*-type effort.

Then the first educational financing case was won in the lower court *Hargrave v. Kirk.*[30] Hargrave presented a much narrower issue than was presented to the court in *McInnis*, but it certainly trenched on *McInnis* ground.

Hargrave involved a Florida statute which provided that any Florida county that imposes on itself more than 10 mills of property tax for educational purposes will not be eligible to receive state funds for the support of its public education system. The plaintiffs there argued that this statute effected a discrimination based on wealth because it distributed taxing authority for educational purposes by a standard related solely to the wealth of the county. The plaintiffs pointed out that the statute permitted Charlotte County to tax itself up to $725 per pupil without losing state support for its public education system, but limited Bradford County to only $52 per pupil on pain of losing state support for its public education system.

In a unanimous opinion invalidating the Florida statute, Circuit Judge Dyer stated:

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[28] *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

[29] *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969).

[30] 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971).

> What apparently is arcane to the defendants is lucid to us — that the Act prevents the poor counties from providing *from their own taxes the* same support for public education which the wealthy counties are able to provide.[31]

This holding too seemed to provide hope for a future victory in a broader *McInnis*-type case.

The third encouraging development was the publication of *Private Wealth and Public Education* by John E. Coons, William H. Clune, III, & Stephen D. Sugarman.[32] As this writer stated in a review in the *Harvard Law Review*,[33] this book "is clearly the most sophisticated, careful and thorough analysis of the subject which has yet appeared". While the book does not say anything that has not been said — or, at least, adumbrated — before, it does say it better. It provided a careful analysis of existing school financing systems and explains in considerable detail and with great effectiveness how they operate to the disadvantage of poorer districts. It explores at length district power-equalizing systems. Finally, it stresses the need for a limited judicial attack on the present system — an attack which would seek to have the court outlaw wealth-related discriminations, but would not try to persuade the court to itself reallocate funds on the basis of a nebulous concept of educational need, as the plaintiff in the *McInnis* case attempted to do.[34]

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[31] 313 F. Supp. at 947.

[32] Cambridge: Harvard University Press (1970).

[33] 84 Harv. L. Rev. 256 (1970).

[34] It is helpful in any equal protection analysis to understand that the equal protection does not demand or command equality. It is framed in negative, not positive, terms: "No State shall . . . *deny* . . ." It forbids inequality. While logically, it is true, equality and inequality are mutually exclusive and exhaust the universe, it nevertheless makes a great deal of practical difference whether we ask, on the one hand, whether particular treatment is unequal in a particular respect, or whether, on the other hand, we ask whether particular treatment is equal in all other respects. We may be able to decide what is unequal — an inquiry which can easily be narrowed and pinpointed — without having the haziest notion as to what is equal. To determine what is equal requires omniscience with re-

However, by all odds the most encouraging development in the somewhat somber post-*McInnis* era is the stunning victory in the *Serrano* case itself.

Further Analysis of Serrano

Let us turn then to an analysis of the California Supreme Court's reasoning: The first question for the Court was whether the "rational basis" test or the "compelling interest" test should be applied. As previously noted, it seems clear from explicit United States Supreme Court statements that the "compelling interest" test applies to cases involving classifications based on wealth.[35] That the California system for financing public education classifies on the basis of wealth, the Court found plain. Therefore, on this ground alone, the Court concluded that the "compelling interest" test should apply. However, the Court also appeared to rule that the "compelling interest" test applied for another independent reason. The United States Supreme Court as indicated that the "compelling interest" test applies whenever a "fundamental right" is involved.[36] In the *Serrano* case the California Supreme Court concluded for the first time that education was a fundamental right or interest,[37] and therefore required the application

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spect to the infinite aspects to any particular distribution of benefit or burden, plus the ability to measure or weigh each aspect in comparison to the others — an impossible task, certainly for the judiciary.

In short, the equal protection clause is a negative command, and the only relief a successful suitor can legitimately seek is the removal of the inequality *he* attacks.

[35] *McDonald v. Board of Election Commissioners,* 394 U.S. 802, 807 (1969), citing *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1968).

[36] *McDonald v. Board of Election Commissioners, supra,* at 807; citing *Kramer v. Union Free School District,* 395 U.S. 621 (1969).

[37] The Court appears to use right and interest almost interchangeably. The Court speaks of the "right to education, which we have determined to be fundamental" (Slip op. 22 n. 13); a "number of fundamental interests [including] rights of [criminal] defendants" (Slip op. 33); the court speaks of comparing "the right to an education with the rights of defendants in criminal cases and the right to vote"

of the "compelling interest" test. Having concluded on two grounds that the "compelling interest" test was applicable, the Court then turned to whether the California system for financing public education met that test. The Court had no difficulty in concluding that California's system of financing public education was not necessary to promote a compelling state interest. Accordingly, the Court condemned the system as a violation of the equal protection clause.

Both legs of the Court's analysis have their shortcomings, but the result is correct.

Taking the second leg first, it is true that the United States Supreme Court has indicated that the compelling interest test is applicable when a fundamental right is involved, but this is patently erroneous. For that reason it is highly unlikely that the Supreme Court would itself apply such a rule if that were the only basis for granting relief.

Assuming elementary and secondary education to be a fundamental interest,[38] we often discriminate — and properly so — in its distribution. For example, we discriminate among students by providing more money for high school students than for elementary school students. We provide different courses for students with different interests. We provide special facilities for the culturally deprived. All of these instances of differing treatment may be reasonable, wise and desirable. But they are hardly necessary to promote a compelling state interest — unless we torture

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(Slip op. 29); the court concludes that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'" (Slip op. 42).

[38] College education may or may not be different from secondary education. Consider the following example. A state university makes available to any qualified sudent, upon payment of a $1,000 tuition fee each year, a university education which costs the state $3,000 per year. The qualified student who cannot afford the $1,000 tuition fee is denied the $2,000 grant which the state in effect makes to the student who can afford the $1,000 tuition fee. Cf. *McMillan v. Garlick*, 430 F. 2d 1145 (2d Cir. 1970).

those words to encompass ideas which they do not now contain.

The same kind of examples could be cited with respect to any interest whose fundamentality, unlike education, is unquestioned. Surely the right to vote is a fundamental interest. Yet convicted felons are commonly denied the right to vote. No one would suggest, however, that this form of discrimination must be justified by reference to a compelling state interest if it is to be sustained against attack under the equal protection clause. Both the denial and the grant of the franchise to convicted felons are reasonable rules, and neither rule is unconstitutional even though a fundamental interest is involved.

That the "compelling interest" test is not applicable simply because a fundamental right is involved may also be demonstrated by considering the two constituent elements involved in any equal protection analysis. The first element may be denominated as the "basis of classification", such as wealth or race. This element has also been described as "the classifying fact"[39] or "the differentiating classification".[40]

The second element which is involved in any equal protection analysis is the "benefit" or "detriment" which government is distributing differentially on the basis of the classifying fact. The benefit or detriment may be the franchise, a particular educational resource, or a jail term. In every equal protection analysis the question is, or should be, whether the particular classifying fact can appropriately be used as a basis for the differential distribution of the benefit or detriment involved.

To say that the "compelling interest" test is applicable whenever a fundamental interest is involved is to say that we can determine whether an equal protection violation has occurred simply by examining the nature of the benefit

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[39] Coons, Clune & Sugarman, Private Wealth and Public Education, p. 342.

[40] Mr. Justice Harlan in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 681 (1966) (dissenting opinion).

or detriment which is differentially distributed, without regard to the nature or character of the classifying fact. It is to say that no distinctions with respect to fundamental interests can be made unless they are necessary to a compelling state interest. This argument falls of it own weight.

This does not indicate, or even imply, that the fundamentality of the interest involved is either irrelevant or unimportant. The fundamentality of the interest has a significance to another, perhaps crucial, aspect of a proper analysis of the *Serrano* problem, to which we shall return.

The other leg on which the *Serrano* decision stands is that the "compelling interest" test is applicable to wealth as a differentiating classification, and that wealth is so used in this case. With the statement of principle that government should not be permitted to classify on the basis of wealth unless to do so is necessary to promote a compelling governmental interest, few could disagree.[41] Whether the *Serrano* case involves a discrimination based on wealth is another question. I believe it does not.

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[41] Even Mr. Justice Harlan (who has dissented from most of the equal protection cases on which plaintiffs rely in wealth discrimination cases) agrees that discrimination based on wealth is unconstitutional:

> It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support . . . *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (dissenting opinion).

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and *application* of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. *Douglas v. California*, 372 U.S. 353, 361 (1963) (dissenting opinion) emphasis supplied as to the word "application").

However, strangely enough, Justice Harlan does not appear to require the application of the "compelling interest" test to wealth classifications. See *Dandridge v. Williams*, 397 U.S. 471, 489 (1970) (concurring opinion); *Shapiro v. Thompson*, 394 U.S. 618, 659-61 (1969) (dissenting opinion).

The *Serrano* case involves, instead, a discrimination based on ability to pay. The difference is subtle, sometimes difficult to grasp, but nevertheless important. A law prohibiting all people earning less than $3,000 per year from using a public park is a discrimination based on wealth; one forbidding entry to a park unless a three dollar admission fee is paid is a discrimination based on ability to pay. In one sense, it may be argued both come to the same thing: Neither the poor man nor his child can afford the three dollar admission fee, so they are fenced out just as surely as if they had been denied admission to the park because of the father's failure to earn more than $3,000 per year. However, from the viewpoint of equal protection theory, it makes a good deal of difference. It is much more difficult to justify a discrimination based on wealth than on ability to pay. For example, all would agree that the "compelling interest" test should be applicable to a law that forbad poor people from buying tickets to the municipal opera. But what about charging the poor man $15 for a seat? Or how about charging the poor man the same toll as the rich man on a state turnpike?

In short, the "compelling interest" test is always applicable to wealth discriminations.[42] But not all discriminations based on ability to pay are to be judged on the basis of this more stringent test. To argue that all discriminations based on ability to pay are subject to the "compelling interest" test would mean that government could never impose a uniform fee on all citizens.

When is fee paying or discrimination based on ability to pay unconstitutional? We know that in some cases it is not permitted. For example, in *Harper v. Virginia Board of Elections*[43] the Court struck down a $1.50 poll tax. The case involved, strictly speaking, not a discrimination based

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[42] Except for so-called benign wealth discriminations, such as welfare payments (which discriminate in favor of the poor) or graduated income tax (which discriminates against the rich). On benign racial classifications, see "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065, 1104-1120 (1969).

[43] 383 U.S. 663 (1966).

on wealth (although it is widely cited for this proposition), but a discrimination based on ability to pay (or fee-paying). Rich and poor alike were charged the $1.50 poll tax. The statute did not say to the poor man who manages by dint of great sacrifice to come up with the $1.50 poll tax, "You are not permitted to pay the $1.50 poll tax." The indigent citizen was denied the franchise only if he did not have the $1.50. The state would clearly have accepted the fee from an indigent person who was willing to pay the fee. Therefore, the statute discriminated on the basis of ability to pay, rather than wealth, although the effect may be and often is the same; namely, to fence out indigent voters.

The Court stated:

> A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an electoral standard.[44]
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> * * * * * *
>
> To introduce wealth *or* payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor.[45]
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> * * * * * *
>
> [W]*ealth or fee paying* has, in our view, no relation to voting qualifications.[46]

An analysis similar to the one just undertaken for *Harper* can be made of *Serrano*. In *Serrano*, the state is not preventing or forbidding Baldwin Park from raising as much money for its educational system as Beverly Hills.[47] Baldwin Park is free to raise as much money for its educational system as it wishes. Baldwin Park's problem arises from the fact that, like the poor man who wants a seat

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[44] 383 U.S. at 666; emphasis supplied.

[45] 383 U.S. at 668, emphasis supplied.

[46] 383 U.S. at 670; emphasis supplied.

[47] If it did, such a case would be condemned by *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971).

to the municipal opera, it can't afford it. Baldwin Park doesn't have the ability to itself pay for the kind of educational system it would like.

The *Harper* case and other cases cited in a footnote,[48] in which fee-paying has been condemned as violative of the equal protection clause, provide a guideline as to when discriminations based on ability to pay or fee-paying are unconstitutional; that is, when fundamentally important interests are involved.

It is at this point in the analysis that the fundamentality or importance of education becomes relevant. In short, fee-paying, or discrimination based on ability to pay, violates the equal protection clause only when the benefit or detriment differentially distributed is of fundamental importance. The California Supreme Court's discussion of the importance of education is an excellent one and fully supports the conclusion that the "compelling interest" test is applicable to the facts of that case because it involves a discrimination based on ability to pay in the distribution of a fundamentally important benefit. Needless to say, it is also obvious that California's present system of financing public education is not necessary to promote a compelling state interest, and it must therefore be struck down as unconstitutional.

The foregoing analysis, indicates that the judgment — if not all of the reasoning — of the California Supreme Court should be adopted by the United States Supreme Court. However, there is great doubt that this will occur.

The first major obstacle to an adoption of the *Serrano* judgment by the Supreme Court is, of course, the *McInnis* and *Burruss* cases. However, *McInnis* can be distinguished from *Serrano* on the ground that in *McInnis* the plaintiffs argued, not that the Constitution forbade discrimination

[48] For other cases in which fee-paying has been declared unconstitutional as it affects the poor, see *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Oklahoma City*, 392 U.S. 458 (1969); and *Tate v. Short*, 401 U.S. 395 (1971).

based on wealth, but that the Constitution required the distribution of educational resources based on the "educational needs" of the students, whatever that is.[49] *Burruss* simply followed *McInnis*. Moreover, it may well be, as the California Supreme Court has suggested, that the *McInnis* and *Burruss* decisions are nothing more than a refusal by the Supreme Court to deal with the question at that time. These decisions were not, according to this view, a rejection of the constitutional position, but simply the practical equivalent of a denial of certiorari.[50] In any event, the Supreme Court knows how to overcome even a series of *per curiam* affirmances when it wants to.[51]

The second, and perhaps more serious, hesitation in predicting that the *Serrano* rule will be adopted by the United States Supreme Court is the tenor of decisions during the last term of court. To summarize, the 1970-71 term of the United States Supreme Court was disastrous from the point of view of civil rights and civil liberities advocates.[52]

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[49] The *McInnis* plaintiffs went so far as to argue — in the first case dealing with economic equality of educational opportunity — that the equal protection clause required more than equal per pupil state expenditure for "culturally and economically deprived areas" in order to equalize the educational opportunity of children from these areas.

[50] The cases came up by way of an appeal from three judge courts.

[51] E.g., *Baker v. Carr*, 369 U.S. 186, 278 (1962); *McGowan v. Maryland*, 366 U.S. 420, 511 (1961). See also *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Court gave plenary consideration to an issue which had previously been ruled on in a series of *per curiam* decisions. Gobitis was, of course, overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[52] See, for example, the so-called February Sextet, led by *Younger v. Harris*, 401 U.S. 37 (1971), which sapped the vitality of *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Askew v. Hargrave*, 401 U.S. 179 (1971), which for the first time applied the doctrine of abstention to a Civil Rights Act (42 U.S.C. §1983) case; *Wyman v. James*, 400 U.S. 309, 324 (1971), Justice Blackmun's first majority opinion in which he rejected the welfare claimant's plea to privacy and stated, "[The welfare claimant] has the 'right' to refuse the [social worker's] home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved", *Palmer v. Thompson*, 403 U.S. 217 (1971), holding that a city may close its

More specifically, however, the Court has indicated what can only be described as an insensitivity to the claims of the poor. In *James v. Valtierra*,[53] the plaintiffs attacked under the equal protection clause a provision in the California Constitution which provided that no low rent housing project could be constructed by a state public body unless the project was approved by a majority of those voting at a community election. Because the provision required voter approval of housing only for the poor, the plaintiffs contended that the provision effected a wealth discrimination as well as a racial discrimination. The Court was unable to find any unconstitutional discrimination. The opinion deals explicitly only with the question of racial discrimination, which it rejects. The claim of wealth discrimination is obliquely and lightly brushed off: referendums "always disadvantage some groups."[54] The California constitutional provisions, according to the Court, "demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[55] The dissent (Justice Marshall speaking for himself and Justices Brennan and Blackmun) saw the California constitutional provision as "an explicit classification on the basis of poverty".[56] For the dissenters, it was plain that "the article explicitly singles out low income persons to bear its burden".[57] The fact that the majority explicitly treated only the question of alleged racial discrimination prompted this response in the dissenting opinion:

> It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimina-

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swimming pools to avoid desegregating them; *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), limiting the extent to which procedural rights are available in juvenile court proceedings; and *Rogers v. Bellei*, 401 U.S. 814 (1971), holding that an American citizen by birth who was not born in this country may be involuntarily deprived of his citizenship by residing abroad.

[53] 402 U.S. 137 (1971).
[54] 402 U.S. at 142.
[55] 402 U.S. at 141.
[56] 402 U.S. at 144-5.
[57] 402 U.S. at 144.

> tion; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[58]

If the *Valtierra* case says anything close to what the dissenters imply it says, the *Serrano* rule is in deep trouble.

Moreover, the Court last term showed a reluctance to expand further its application of the equal protection clause — and it has refused to do so in a case peculiarly relevant to the *Serrano* case. The case I refer to is *Gordon v. Lance*,[59] which involved an attack, on equal protection grounds, on a statute which required a 60 percent majority to pass a school bond issue. The plaintiffs argued that the equal protection clause was violated because in effect "no" voters were given votes of greater weight than "yes" voters and that there was no compelling state interest requiring "no" voters to be treated differently from "yes" voters.

By the time *Gordon* reached the Supreme Court, similar cases had come up in a number of courts, some decided one way and some the other. A case from California had been decided in favor of the plaintiffs — that is, the California decision held that the so-called extraordinary majority provision was unconstitutional as a violation of the equal protection clause.[60] The California Supreme Court opinion in the *Westbrook* case far outshone anything which had been previously written on the subject. The author of the opinion was Justice Sullivan, the same Justice Sullivan who wrote the California Supreme Court's decision in the *Serrano* case. In the *Gordon* case, the United States Supreme Court ruled in a fuzzy opinion by Mr. Chief Justice Burger that extraordinary majority provisions do not violate the equal protection clause. Despite the fact that Justice Sullivan's brilliant analysis in *Westbrook* was available to the Chief Justice when he wrote, the Chief

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[58] 402 U.S. at 145.

[59] 403 U.S. 1 (decided June 7, 1971).

[60] See Stern and Gressman, Supreme Court Practice (4th ed.) §312.

Justice did not so much as give a passing nod to it. When *Westbrook* came to the Supreme Court later in the same term, the Court, in a one-sentence order, simply vacated the judgment entered by Justice Sullivan's Court, citing as authority the United States Supreme Court's decision in *Gordon v. Lance*. Whether a similar fate awaits Justice Sullivan's opinion in *Serrano* remain to be seen.

Conclusion

We may conclude with a few observations on procedural matters.

It is unlikely that the United States Supreme Court would have jurisdiction to review the judgment of the California Supreme Court in the *Serrano* case. At the present time the California judgment is not final, because the California Supreme Court has simply reversed the lower court's dismissal of the complaint and remanded the case for trial.[61] But even after trial, assuming the plaintiffs are successful, United States Supreme Court jurisdiction of this case is doubtful. This is because the California Supreme Court's judgment rests on state, as well as federal, grounds. The California Supreme Court interpreted the California Constitution as imposing the same obligations on the defendants as the equal protection clause of the federal Constitution imposes on them.[62] Accordingly,

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[61] See Stern and Gressman, *Supreme Court Practice* (4th ed.) §3.12.

[62] The California Supreme Court decision (Slip op. 17 n. 11) notes that "The complaint also alleges that the financing system violates [several provisions] of the California Constitution . . . We have construed these provisions as 'substanially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution . . . Consequently, our analysis of plaintiffs' federal equal protection contenion is also applicable to their claim under these state constitutional provisions". This, it seems to me, establishes an adequate non-federal ground for the decision, so as to eliminate the United States Supreme Court's jurisdiction to review. See generally, Stern and Gressman, Supreme Court Practice (4th ed.) §§3.31-3.32. The California Supreme Court's decision certainly does not "leave the impression that the Court probably felt constrained to rule as it

even if the United States Supreme Court ruled that the California Supreme Court had misinterpreted the Federal Constitution, the plaintiffs would still be entitled to the same judgment because of their rights under the California Constitution, on which the California Supreme Court, not the United States Supreme Court, has the last word. In effect, since the United States Supreme Court cannot change the result, it does not have jurisdiction.

As one who favors the result reached by the California Court in *Serrano*, I am not displeased that the United States Supreme Court appears not to have jurisdiction. In my view, the best chance for the adoption of the *Serrano* rule by the United States Supreme Court lies in delaying a decision on this issue for a few years. If the Supreme Court has an opportunity to see how the *Serrano* decision works in California, the high court might then be convinced to adopt it nationally. However, I fear that if it makes the decision in the next term or so, the result will be an overruling of *Serrano*, not only for the reasons heretofore set forth, but also because the replacements for Justices Black and Harlan are likely to be reluctant to begin their service with a decision that has only slightly less political implications than *Brown v. Board of Education*.

Moreover, the *Serrano* decision, unreviewed by the Supreme Court, is likely to have a healthy *in terrorem* effect on state legislatures — and perhaps Congress as well — encouraging them to eliminate the inequities in their present systems of financing public education. State legis-

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did because of [decisions applying the Fourteenth Amendment]" (*Minnesota v. National Tea Co.*, 309 U.S. 551, 554-555 (1940)), nor that the California Supreme Court "felt under compulsion of Federal law [to hold as it did]" (*Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 15 (1950)). Indeed, the California Supreme Court was no doubt fully aware of the jurisdictional problem (see, *Mental Hygiene Department of California v. Kirchner*, 380 U.S. 194 (1965)), and the language which we have quoted from the California Supreme Court decision was very probably inserted specifically for the purpose of providing an independent state ground for the decision which would defeat any attempt at United States Supreme Court review.

latures must surely realize that their failure to correct the disparities in their own systems, can only encourage the Supreme Court to adopt the *Serrano* rule on a nationwide basis.[63]

[63] It is likely to be several years before the *Serrano* issue can come to the Supreme Court, especially if new cases are instituted in federal, rather than state, court, as has just occurred in Maryland. Federal court may seem at first glance more attractive because of the availability of a three-judge district court and a direct appeal from there to the Supreme Court, as occurred in *McInnis* and *Burruss*. However, since these decisions, the Supreme Court has made it reasonably clear that federal courts should abstain from deciding this issue in deference to state court adjudication. *Askew v. Hargrave*, 401 U.S. 476 (1971). Although the *Askew* decision seems questionable (cf. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)), if the Supreme Court adheres to it, plaintiffs in federal cases are likely to find themselves out of court without a decision on the merits.

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Supreme Court, U. S.
FILED
MAY 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees

On Appeal from the United States District Court for the Western District of Texas

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

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Appellees

MOTION TO AFFIRM

Appellees-Plaintiffs file this Motion to Affirm the Judgment of the trial court.

BACKGROUND

This cause of action was filed on July 10, 1968. A Three Judge Court was duly convened. Preliminary hearings relating to parties were held and amendments of pleadings were filed at the suggestion of the Court in response to defense motions for a more definite statement. Defendants filed motions to dismiss challenging the allegations in the Third Amended Com-

plaint as failing to state a cause of action. The trial Court overruled the motions on October 20, 1969, but stayed further action in order to give the legislature of the State of Texas an opportunity to act.

The Sixty Second Legislature convened in January 1971 and adjourned at the end of May 1971 without considering the matters at issue in this case. The Court then scheduled pre-trial completion and trial. Final arguments were made on December 10, 1970 and the Court entered its decree on December 23, 1970. *Rodriguez v. San Antonio Independent School District*, 337 F.Supp. 280 (W.D.Tex. 1971).

The record is clear and complete. It contains the testimony of nine witnesses and nineteen exhibits, including numerous graphs, charts and reports. The evidence presents a full picture of the operation of the Texas education system in both narrative and statistical form. The extensive facts are summarized in Plaintiffs' Trial Brief filed in the Court below and the stipulations and evidence proving each matter stated in the Third Amended Complaint are set out beginning on page 21 of that Brief. The parties agreed that no material facts were in genuine dispute. Matters not stipulated were proven through more than one source in almost every instance. Each of the matters referred to in this brief are in evidence.

THE TEXAS PUBLIC SCHOOL FINANCING SYSTEM

The basic support of the Texas system of financing public school education is the school district's tax on the value of real property within its boundaries. The sums collected from that tax not only account for approximately one-half of the funding under the state

system, but in part determine a district's capacity and entitlement to the funds from the State. Statewide the district tax bases vary widely, ranging from over $500,000 of value per child to below $10,000 of value per child. The State funding is done through the Foundation School Program which was prior to the 1969 codification entitled the Minimum Foundation Program. The codification did not contain substantive changes. The Program benefits the wealthy districts over the poor districts by using the variable unit form of foundation approach and the incentive matching grant approach to calculation of funding (plus an insignificant amount of fixed unit form of foundation approach). More than 80% of the funds coming from the State are used to pay teachers' salaries under the formulas provided in the Texas Education Code, Section 16.31 et. seq. and 16.98. The amount the State pays depends on the "quality" of teacher the local district funds. The State sets the standards of quality for teachers based on a matrix of formal degrees and experience.

The theory and facts are that the more a local district puts into salaries, the more qualified its teachers will be according to State standards of qualification. As a result the more money a school spends on teachers' salaries the greater its share of Foundation School Program funds.

To compound the disparity, the State funding is for minimums and local districts can supplement. Wealthy districts can supplement more readily than poor districts. In a common job market this further expands the disparity since the more qualified teachers will tend to go to those schools that afford the higher

salaries and those higher qualifications entitle that school to more funds under the salary portion of the Foundation School Program.

The State pays 80% of the Foundation School Program and the local districts are responsible for the balance. That balance is apportioned according to an economic index. As described by appellants, this index apportions the local funding according to the wealth of the district. The local district does not raise its local fund assignment from a separate assessment, but pays its share out of its ad valorem tax collection. The local fund assignment, therefore, is in a sense merely a credit to the local district.

The disparity under the incentive matching grants State program is so great that the amounts per pupil paid by the State to the wealthy districts remains greater than the sums paid by the State to the poor districts, even after the State has deducted what the local districts are assigned as its portion of the cost of the program. The State's Foundation Program actually expands the disparity of funds available for education between the poor districts and all the other districts. The testimony on this is clear, unequivocal, and stated in narrative, graphic, and statistical terms.

The trial court described school financing for poor districts as a "tax more spend less system." The districts with high value tax bases consistently have higher revenues than the districts with low value tax bases. Both throughout the State and in the Bexar County area (the area in which the Edgewood District is located) the poor districts are making the greatest tax effort, while the rich districts are making the lowest efforts and their revenues remain the highest.

The poor districts contain greater proportions of poor people. The willingness of the poor to make the strongest effort and the other evidence proving their great desire for quality education underscores the strong motivation of all citizens regardless of income to provide quality education for their children.

The Texas Public School Financing System as it Operates in Bexar County, Texas

Seven school districts having 93% of the public school students in Bexar County, Texas are located in a single metropolitan area. Neither cities or counties geographically determine the school district boundaries and no natural geographic reasons exist for their present boundaries. The State Commissioner of Education recognizes that the boundaries serve no education function. The costs of goods and services do not vary and these districts are competing in the same economic job pool. As shown statewide, the poorest local school district, Edgewood, makes the highest tax effort and derives the least revenue because of its low tax base. Its residents have the lowest incomes. It is further agreed that the children in Edgewood do have equal motivation and ability and do not have less educational needs than the children in the other districts. The evidence is also unequivocal that in every classification and criteria they are not afforded the quality of education granted in the other districts. The result is lower achievement and higher dropout rates. Edgewood has the highest percentage of minority students among the districts and the districts having higher percentages of minorities are, as statewide, the poorest while the wealthy districts have the lowest percentages of minority students.

PUBLIC SCHOOL EDUCATION IS A FUNDAMENTAL PERSONAL RIGHT

The Court has recently reaffirmed that public school education is a fundamental personal right: "Though the latitude given State economic and social regulation is necessarily broad, when State statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)." *Weber v. Aetna Casualty & Surety Co.*, 40 Law Week 4460, 4462,____U.S.____(1972). This fundamental right must be made available to all on equal terms. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Without considering the *Brown* decision, the trial court should be affirmed. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

The Court recognizes that public schools cannot be closed to the poor [*Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)] or minorities. The equal protection clause of the Fourteenth Amendment precludes this. Children must attend school. Texas Education Code, §21.032. Appellants contend that it precludes no more than this. Plaintiffs contend that merely opening a school, while providing mass discrimination to minorities and the poor in public school education, does not meet the standards of the Fourteenth Amendment.

The State did not make people poor, but the State did create poor school districts. The State set the boundaries and has control over altering those boundaries. In fact, when a small-poor district becomes by

fortuitous circumstances a wealthy district, i.e., large industrial plants being built in the district, the State provides means for the majority of the community to alter the district lines. *West Orange-Cove Con. I.S.D. v. County Bd. of School Tr.*, 430 S.W. 2d 65 (Tex. Civ. App. 1968) ref. n.r.e.

The Texas System Discriminates On The Basis of Wealth

The property wealth within the boundaries of each state created district determines the quality of education under the Texas system. The strict scrutiny demanded of any statutory classifications approaching sensitive and fundamental personal rights are further called into question when the classifications are based upon wealth. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Harper v. Virginia*, 383 U.S. 663 (1966); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969).

The Texas System Discriminates Against Minorities

The evidence statewide and in Bexar County is that as the percentage of minority residents in a district increases, the tax effort increases, while the revenues available for education decrease. This is because of the low tax base in districts which have the high percentages of minorities. The richest districts have the least numbers of minority residents and the most funds.

The minority represented herein has been discriminated against in education (in 1950 the State school system was under an injunction not to participate in the segregation of Mexican Americans), housing, and employment opportunities. Mexican Americans live in

poor neighborhoods for reasons other than poverty. Restrictive covenants which the record reflects were enforced by Texas Courts barred Mexican Americans from any but the poorest neighborhoods prior to *Shelley v. Kraemer*, 344 U.S. 1 (1947). The continuation of this discrimination was recognized by the Congress of the United States in 1968 by its enactment of Title 42 U.S.C., §3601, et seq., commonly known as the Fair Housing Act.

The Texas System Meets No Fourteenth Amendment Standard

Summary affirmance is further warranted because the Texas system does not bear some rational relationship to a legitimate state purpose. The trial court recognized the Texas system fails to establish a reasonable basis for these classifications. The defendants urge rationality on the ground the system permits local determination on the basis of parental desire. The evidence shows in fact the system in Bexar County and statewide limits the choice of financing by guaranteeing that poor districts have little to spend despite great desire and effort and other districts have large sums resulting from little effort. The Texas system affords different treatment of different classes on the basis of criteria wholly unrelated to the objective of the statutes and does not meet the criteria of being reasonable, not arbitrary, and resting upon a fair and substantial relation to the object of the legislation. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

The Relief Sought Is Judicially Manageable

The affirmances in *McInnis v. Ogilvie*, 394 U.S. 322 (1969), and *Burrus v. Wilkerson*, 397 U.S. 44 (1970), are not inconsistent with the decision of the trial court. The Plaintiffs in *McInnis* and *Burrus* complained on the ground the Equal Protection Clause of the Fourteenth Amendment mandates that each child be educated according to his individual need. The trial courts in *McInnis* and *Burrus* were correct in stating the relief sought was not judicially manageable and was not required by the Equal Protection Clause. In the present case, the Plaintiffs seek merely to enjoin a system that denies them equal protection of the laws. Judicially manageable equal protection standards are well developed and familiar. *Baker v. Carr*, 369 U.S. 186, 226 (1972). The state is left to choose among a variety of systems.

The Relief Sought is Moderate

There is no doubt that the equal protection clause of the Fourteenth Amendment applies to the discrimination imposed upon the public school students who live in the Edgewood School District. Appellants do not contest the vast discrimination. They do raise the unsupported spectre of massive change and *amicus* attempts to raise fear of a mass conspiracy. Can the parents and students in Edgewood or the lawyer who alone handled the burden of this case be accused of being mass conspirators? Plaintiffs only challenge the discrimination of Texas school financing. Are plaintiffs to be denied equal protection because others may be affected? Recently, the Court stated in *Cole v. Pecaros*, 40 Law Week 4381, 4384, _____ U.S._____ (1972): "... bear in mind that many of the hazards

of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with prophecy of dire consequences of certain judicial action, that it would not occur 'while this Court sits'."

Appellants do not contest either at the trial level or in this Court the findings of fact in the Court below. They ask only for legitimation of the State created wealth and racial discrimination in public school education. This Court is asked to redeem the statutory system that requires this discrimination in the allocation of public funds. Plaintiffs do not contend the Fourteenth Amendment guarantees them good education or the privileges private education may bring. Their protest is against a discriminatory State public school system.

Since the decision below could well have been reached on the ground of racial discrimination and the finding that the Texas system has no rational basis, summary affirmance would not necessarily imply either a wealth discrimination decision or a decision involving a fundamental interest. The school wealth discrimination question is now being considered in a number of State and lower Federal Courts. Critical literature is being generated. Summary affirmance would permit development of more judicial and professional thought which could help this Court to reach a more fully informed resolution of the wealth discrimination problem in the future. Since many legislatures are enacting public school education systems to meet State and lower Federal Court decisions future determination will give the Court greater opportunity to view the effect of the relief sought.

Conclusion

For the foregoing reasons it is submitted that this Court should summarily affirm the decision below.

Respectfully submitted,

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FILED
MAY 17 1972
MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

October Term, 1971
No. 71-~~1559~~ 1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT et al.,
Appellants

v.

DEMETRIO P. RODRIGUEZ et al.,
Appellees

On Appeal From a Three-Judge Court From the United States District Court for the Western District of Texas.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

I. INTEREST OF AMICUS CURIAE

The Commonwealth of Pennsylvania maintains one of the largest public school systems in the nation and is responsible for the education of over 2.3 million children. As in other states, Pennsylvania has experienced severe problems in school financing. Certain local school boards have been forced to stretch education dollars by firing teachers, eliminating summer school, curtailing athletic programs and other outside activities, and by extending school holidays. The Commonwealth is committed to solving these problems, and the direction of the reforms is inextricably bound to the issues presented in the instant appeal.

The Attorneys General of approximately 30 states have joined in a brief in support of the jurisdictional statement filed by appellants. That brief states that "... [i]n consequence of time limitations *amici* have not been able to secure the joinder in this brief of all forty-nine of the American states with systems of school finance inconsistent with the supposed constitional principle" (Brief of Amici Curiae in Support of Jurisdictional Statement, at 1-2, footnote omitted).

Pennsylvania feels compelled to file its own brief because its views are not represented by the brief

filed in support of appellants. Amicus believes that to continue to maintain a viable public school system and to make public education available to everyone without discrimination, a system must be devised which provides:

> quality education for every child regardless of his place of residence;
>
> a rational method of school finance to assure the necessary resources;
>
> equity of tax burden on citizens of the state; and
>
> local control over educational matters where appropriate.

Although a local school district in Pennsylvania derives almost half of its revenues from the state, three-fourths of the local tax burden consists of real estate taxes. See *Statistical Report of the Secretary of Education for the School Year Ending June 30, 1969* (1970); *Our Schools Today* (Pa. Dept. of Education, No. 10, 1971); *A Measurement of Local Effort* (1972).

Because of this heavy reliance on real estate taxes, inequities exist in the educational resources available to public school students due to variations in the local property tax bases upon which local school districts must rely to support their schools.

A Department of Education survey indicates significant discrepancies exist between the wealthiest and poorest school districts, with extremes of property tax bases of from $454,055 of property available per student in one district to $4,926 available in an-

other and per pupil expenditures ranging from $1,406.27 to $661.47.

Amicus is in the process of examining the school finance problems in the Commonwealth and a special commission is being appointed to completely review the situation. We are confident that the financial problems and inequities resulting from the present local property tax system can be obviated without great social or administrative difficulty. However, Pennsylvania's reforms, designed to resolve these financial problems, are being obstructed by the uncertainty of the recent cases applying the equal protection clause to school financing.

These reforms could take many directions. Methods of tax equalization could be refined to take greater account of such problems as sparcity or density of population, poverty, and differences in instructional expense. The Pennsylvania legislature has recently dealt with similar school financing and tax equalization dilemmas. See, e.g., Act of August 18, 1971, P. L. , No. 88, 24 P.S. §25-2501, et seq. As another alternative, Governor Milton J. Shapp has proposed an innovative program for the establishment of a National Education Trust Fund by the federal government to subsidize local and state educational expenditures.

However, due to the ever increasing uncertainties and confusion prevalent in the lower federal and state courts on the issue of the application of the equal protection clause to school financing, it has become imperative for this Court to hear and resolve the issues.

Equal educational opportunity is not a reality today. The Commonwealth of Pennsylvania, possesses

a vital interest in working toward this goal. It believes the principle of "fiscal neutrality," as defined by the three-judge court below is a salutory one, and one which does not involve the judiciary in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. Rather, the states are left free to ". . . adopt the financial scheme desired so long as variations in wealth among the governmentality chosen units do not affect spending for education of any child." *Rodriguez v. San Antonio Independent School District,* 387 F. Supp. 280, 284 (1971).

II. ARGUMENT

THE QUESTION PRESENTED IN THIS APPEAL CONCERNS CRITICAL AND COMPLEX ISSUES WHICH DEMAND TO BE RESOLVED BY THIS COURT

Serious and urgent issues are involved in the instant appeal which should be heard. This Court is no stranger to these issues, see *McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), aff'd. mem. sub nom., *McInnis v. Ogelvie,* 394 U.S. 322 (1969); *Buruss v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), aff'd. mem. 397 U.S. 44 (1970), and considerable confusion exists about the significance of this Court's memorandum affirmances in those cases. Compare *Rodriguez v. San Antonio Independent School District,* supra, 337 F. Supp. at 283, and *Van Dusartz v. Hatfield,* 334 F. Supp. 870, 875 (D. Minn. 1971), with *Spano v. Board of Education of Lake and Central School District,* 328 N.Y.S. 2d 229, 231 (Sup. Ct., West. Co., 1972).*

* The subject has also been the source of much scholarly debate. See, e.g., *J. Coons, W. Clune, S. Sugarman, Private Wealth and Public Education* (1970); *A. E. Wise, Rich Schools, Poor Schools; The Promise of Equal Educational Opportunity* (1968); Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and in Public Assistance Programs from Place to Place Within a State,* 15 *U.C.L.A. L. Rev.* 787 (1968); Horowitz, *Unseparate But Un-*

In light of this confusion and the urgent nature of the educational crisis confronting Pennsylvania today, and because state efforts to cope with these problems will be unnecessarily hindered by multiple lawsuits, this Court should hear this appeal.

Delay will only further exacerbate our educational crisis, and the sooner the constitutional dimensions of the problem are resolved, the sooner reforms can begin in this most important area of state and local governmental responsibility. As this court stated in the now familiar passage of the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954):

> Today, *education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

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equal—The Emerging Fourteenth Amendment Issue in Public School Education, 13 *U.C.L.A. L. Rev.* 1147 (1966); Kirp, *The Poor, The Schools and Equal Protection*, 38 *Harv. Educ. Rev.* 635 (1968); Kurland, *Equal Educational Opportunity; The Limits of Constitutional Jurisprudence Undefined*, 35 *U. Chi. L. Rev.* 583 (1968); Schoettle, *The Equal Protection Clause in Public Education*, 71 *Colum. L. Rev.* 1355 (1971); Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 *Wis. L. Rev.* 7; Note, *Equality of Educational Opportunity: Are "Compensatory Programs" Constitutionally Required*, 42 S. Cal. L. Rev. 146 (1969).

> Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.
>
> Id. at 493. (Emphasis added.)

The importance of the issue cannot be gainsaid. Yet, in their brief amici for appellants raise questions in shotgun fashion concerning federal jurisdiction and the applicability of the doctrine of abstention, in an attempt to persuade this Court to decide this appeal by summary reversal. It is earnestly submitted that such a cursory disposal of so vital a matter, affecting the school systems of forty-nine states, would merely perpetuate the already burgeoning confusion noted above, and also would be contrary to well established principles of abstention and federal jurisdiction.

(a) This appeal is not an appropriate case to exercise the doctrine of federal court abstention.

Amici for appellants criticize the Texas three-judge court for not considering the applicability of the abstention doctrine, as recently articulated by this Court in *Askew v. Hargrove*, 401 U.S. 476 (1971).

A close examination of *Askew* demonstrates that the instant case differs in many significant respects. In *Askew*, this Court invoked abstention because it

was informed by counsel during oral argument that a state court proceeding had been filed attacking Florida's school financing system *solely* on the basis of state law and the Florida constitution. In these circumstances, the Court quite properly chose to refrain from acting because of the pendency of primarily state law claims under the Florida constitution, which claims, if sustained, would obviate the necessity of determining the Fourteenth Amendment question.

No such "state law" suit is pending in Texas in the instant case. Abstention is not necessary in every case where a federal court is faced with a question of local law. See, *Reetz v. Bozanich*, 397 U.S. 82 (1970). This Court has often stressed that abstention was applicable ". . . only in narrowly limited 'special circumstances'." *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (citing *Proper v. Clark*, 337 U.S. 472, 492 (1949)). The abstention doctrine is a judicially created rule which involves duplication of effort, expense, and an attendant delay, see *England v. Louisiana State Board*, 375 U.S. 411 (1964), and should be applied only where ". . . the issue of state law is uncertain." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). The classic case in that tradition is where ". . . the nub of the whole controversy may be the state constitution. . . ." *Reetz v. Bozanich*, supra, 397 U.S. at 87 (1970).

Whatever else may be said about the present litigation, the nub of the issue is not the constitution of the state of Texas, or a "unique resource," of that state. Id. at 87. Rather, vitally important questions are involved concerning the scope of the Fourteenth

Amendment, the validity and "suspect" nature of wealth-based classifications, and the "fundamental" quality of education in forty-nine states of this Republic.

(b) Adequate federal jurisdiction exists to hear and decide the controversy presented by this appeal.

The three-judge court below, convened pursuant to 28 U.S.C. §2281, determined it possessed jurisdiction to hear this suit pursuant to 28 U.S.C. §§1331 and 1343. The court's ruling in this issue was clearly correct, and is contested only by amici for appellants.

Plaintiffs below, in this complaint, raised a substantial federal question arising under the Constitution; specifically, whether the school financing system of the State of Texas violates their constitutionally protected right to equal protection under the law in that that system allegedly makes the quality of education afforded children dependent on the wealth of their individual district rather than the wealth of the state as a whole.

Sufficient state action is present to satisfy 28 U.S.C. §1343, for the school districts are unquestionably administrative units of the State of Texas, as they are in Pennsylvania and the other forty-nine states with similar systems. Any challenge to the jurisdiction of this Court is frivolous.

(c) The Court should not be deterred from hearing this appeal because of the spectre of administrative and educational chaos raised by amici for appellants.

Amici for appellants stress that for this Court to hear this case would run counter ". . . to seven centuries of Anglo-American history . . ." and be an ". . . unparalled affront to the fundamental principles of government. . . ." (Brief of Amici Curiae in Support of Jurisdictional Statement at 22). Further, it is argued that irreparable damage will be done to the political institutions and processes of all but one of the States, with concomitant administrative and social disruptions, such as drastic reductions in educational expenditures, wholesale teacher firings, disruptions, and teacher strikes. Id. at 3.

The Commonwealth of Pennsylvania does not share this gloomy, cataclysmic view. Everyone involved in this appeal, as well as professional educators and men charged with the responsibility of government throughout the country, recognize that a crisis exists in our public schools, especially with regard to financing. We must be prepared to explore new and more appropriate methods of revitalizing our educational system. Responsibility for implementing the changes required by fiscal neutrality should be left with the states.

However, to term such adjustments as "impossible" and the advent of "socialized education" obscures the far more difficult constitutional questions of whether a "fundamental" right is involved and what standard

for evaluating the pertinent state interests should be invoked.

The administrative burdens created by ultimately affirming the principle of fiscal neutrality adopted by the court below would not be unduly onerous. Formulas involving density and sparcity can be incorporated into the tax structure, and alternative revenue producing sources can be found.

CONCLUSION

Because of the vast importance of the question presented by this appeal, and its suitability for judicial action, your amicus, the Commonwealth of Pennsylvania, respectfully urges this Court to forestall further needless litigation and conflict and resolve the ever increasing confusion in the lower courts and the state courts by noting probable jurisdiction and setting the appeal for argument. Only then will the states be able to formulate meaningful plans for dealing with the problem.

Respectfully submitted,

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Counsel for the Commonwealth of Pennsylvania and Governor Milton J. Shapp

COPY

MAY 17 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*, *Appellants*,

v.

DEMETRIO P. RODRIGUEZ, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR

WENDELL ANDERSON, Governor of the State of Minnesota
KENNETH M. CURTIS, Governor of the State of Maine
RICHARD F. KNEIP, Governor of the State of South Dakota
PATRICK J. LUCEY, Governor of the State of Wisconsin
WILLIAM G. MILLIKEN, Governor of the State of Michigan

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PRESS OF ROBERT L. ASHBY PRINTING, INC., WASHINGTON, D. C.

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WILLIAM G. MILLIKEN, Governor of the State of Michigan

AS AMICI CURIAE

Amici hereby respectfully move for leave to file a brief urging affirmance of the decision of the lower court in the above-entitled case. Counsel for Appellees have consented to the filing of the attached brief. Counsel for Appellants have not consented to its filing.

The interests of Amici and their reasons for requesting leave to file the attached brief are as follows:

1. Amici, whose individual and particular interests are set forth in more detail below, are the Governors of the above-listed States. As Governors and chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions and laws of their various States, including the provisions thereof requiring the establishment of public schools and school districts and commanding the children of their States to attend school. Amici are responsible for financial decisions affecting all State operations, including those pertaining to support and financing of the public schools.

2. Amici are deeply concerned about the ongoing and continuing crisis in public education and the difficulties facing public educational systems in their States and around the nation. Amici recognize that grave inequities now exist in the educational resources available to public school students, and that these inequities exist because of variation in local property tax bases upon which local school districts must rely in order to support their school systems. Amici believe that these inequalities in educational resources violate the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated. It is for this reason that Amici today request leave to file the attached Brief.

3. In pursuance of their duties as chief executive officers of their States, Amici have thoroughly examined and are familiar with school finance problems in their States. Amici believe that these finance prob-

lems and the inequities resulting from the current local property tax-based systems can be obviated without great difficulty, social or administrative, by the institution of school finance systems not dependent upon the wealth of the local school districts.

4. Amici believe it is necessary, in order to continue to maintain a viable public school system and to make such public education available to all without discrimination, that a system be devised which provides:

—quality education for every child, regardless of his place of residence;

—a rational method of school finance to assure the necessary resources;

—equity of tax burden among the citizens of a state; and

—local control over educational matters where appropriate.

5. Each Amicus has taken steps to achieve these goals within his state:

(a) The Amicus Wendell Anderson is Governor of the State of Minnesota. The public schools of Minnesota have historically relied upon local property taxes for well over half of operating funds. The resulting system of pubic school financing produced great inequities for both taxpayers and school children. Extremes of per pupil expenditures went from less than $400 to more than $1,000. Tax rates varied from 80 mills to more than 300 mills. Many high expenditure districts were able to finance their expensive and high quality educational programs with lower property taxes than nearby low expenditure districts. This was caused by the inequalities of property tax capacity between districts.

In 1971 the Amicus presented specific proposals to eliminate inequalities based upon the differing property tax capacity of rich and poor districts. The legislature adopted the proposals in a modified form. The state share of school operating cost was raised from 43% in the 1970-71 school year to more than 60% in the 1971-72 school year to approximately 70% for the 1972-73 school year. The inequality of tax rates between school districts has been greatly decreased under the new system. Overall property taxes for school operating cost have been reduced approximately 20% with reductions of more than 60% in some very poor districts with formerly higher tax rates. Transition to the new finance system has been smooth. Local school boards retain their previously existing authority over programs, curriculum and how funds are expended. The Amicus is currently preparing recommendations for amendments to that law to strengthen and perfect its equalization aims.

(b) The Amicus Kenneth M. Curtis is Governor of the State of Maine. In the State of Maine approximately 60% of the revenues to support public schools are received from the local property tax. There are pronounced inequities among towns in both the administration of the tax and the amount levied. Well documented studies by the Legislature and the Maine Education Council indicate that a fairer and less burdensome system could be adopted by using funds from a State collected property tax with a uniform mill school levy supplemented by other increased State revenues to finance our public schools. Additional proposals presented to the Maine Legislature include a phased full state funding of public school costs financed primarily by an increase in the State income tax.

The Resolution of December 10, 1971 by the Maine State Board of Education is but one example of the continuing efforts the State of Maine is making to resolve any present inequities in school finance by decreasing the reliance on local property tax as a source of school funds. Pursuant to these efforts, by a joint order of February 4, 1972, the Maine State Legislature established a representative committee to study the tax structure of the State. Amicus believes, as do many civic, governmental and educational groups in Maine, that a revised system of public school finance which complies with the Fourteenth Amendment as interpreted by the court below can and should be established in the State of Maine.

(c) The Amicus Richard F. Kneip is Governor of the State of South Dakota. Article VIII, § 1 of the Constitution of the State of South Dakota states that "the stabilization of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education." The public schools of South Dakota have historically relied upon local property taxes for approximately 70% of their funds, and the State government has historically failed to fund fully its minimum foundation program of support for schools which is designed to reduce finance disparities among school districts.

In 1968 the South Dakota Education Policies and Goals Commission established by the South Dakota Legislature pointed out that inequalities in financial

ability and educational load exist among South Dakota school districts and that these inequalities could be reduced by increasing the proportions of school cost assumed by the State with funds to be distributed on an equalization basis.

In 1971 the Counsel For Tax Decision established by the Amicus recommended revisions in the State and local tax structure and educational finance system that include (1) substituting State funds for portions of local school property taxes with those State funds distributed on an equalization basis; (2) modifying the State minimum foundation program to improve its equalization affects; and (3) equalizing the burden of property and sales taxes with respect to the income of taxpayers. These proposals of the Counsel For Tax Decision form the basis for the recommendations of the Amicus to the 1972 South Dakota Legislature, and these recommendations would have, if adopted, the effect of reducing the inequalities in the financial resources available for the education of children in different locations in South Dakota and in reducing inequalities in the tax burden among the citizens of the State. The Amicus is continuing through the resources available to his office a review of alternative tax and educational finance proposals to form the basis of future recommendations aimed at achieving equality of educational opportunities and equity in taxation.

(d) The Amicus Patrick J. Lucey is Governor of the State of Wisconsin. Wisconsin has historically been committed to resolving the problems of financing primary and secondary education; the State has taken action designed to meet the many legal and fiscal problems associated with financing elementary and secondary education by the property tax due to the

combination of rising education costs, requirements for equal educational opportunity, and accelerating needs for other local services. The Wisconsin Legislature recently reformed the method of tax redistribution from the State to local units of government to result in more equitable allocation of State revenues.

Wisconsin has created a Governor's Task Force on Educational Financing and Tax Reform. The Task Force has been charged with the responsibility of reviewing the State's educational financing dilemma and making recommendations to alleviate the problems. This Task Force is now working on proposals for new financing methods. It should be noted that all of these State efforts are attempts to shift the burden of financing education from the local property tax to some other, more equitable, revenue source. The existence of property taxpayer revolts in Wisconsin, which reflect the oppressive burden the property tax is placing on the State's corporate and individual citizenry, makes it obvious that the local property tax is an inappropriate funding source for educational needs.

(e) The Amicus William G. Milliken is Governor of the State of Michigan. There has been a growing recognition of the inequities caused by Michigan's system of school finance in which 52% of the revenues are derived from the local property tax. The inequities have continued to grow since they were first documented in the comprehensive study "School Finance and Educational Opportunity in Michigan," conducted in 1968 by the Michigan Department of Education at the direction of the Legislature. Following the report, the Amicus appointed a Governor's commission to examine the alternative proposals made in the study

and to make specific recommendations. Based upon these recommendations, a school finance reform proposal was submitted to the people and Legislature of Michigan. The proposal would eliminate the inequities caused by the variation of property tax wealth among local school districts.

The Amicus believes, as do many civic, educational, and research groups in Michigan, that his alternative can be implemented at a reasonable cost while improving the quality of education and retaining the traditional powers and responsibilities of local school boards.

Amici have examined the issues presented to the Court by this case. Amici have concluded that (a) there is no practical or administrative reason why revised systems of financial support of public school systems, consistent with the decision of the court below, cannot be instituted, and (b) a public school system of the type required to provide meaningful education for all our children can only result from the standard found constitutionally required by the Court below. Amici accordingly request that the Court grant leave to file the attached brief urging affirmance of the decision of the lower court.

Respectfully submitted,

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Attorneys for Amici Curiae

May 17, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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On Appeal from the United States District Court for the Western District of Texas

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BRIEF FOR

WENDELL ANDERSON, Governor of the State of Minnesota
KENNETH M. CURTIS, Governor of the State of Maine
RICHARD F. KNEIP, Governor of the State of South Dakota
PATRICK J. LUCEY, Governor of the State of Wisconsin
WILLIAM G. MILLIKEN, Governor of the State of Michigan

AS AMICI CURIAE

QUESTION PRESENTED

Whether the decision of the United States District Court for the Western District of Texas, holding that the Texas scheme for financing public school education violates the Equal Protection Clause of the Fourteenth Amendment by creating a system in which the funds

available to a school district depend in large part upon the wealth of the district, as measured by the property tax base, should be affirmed.

PROCEEDINGS BELOW

Plaintiffs brought this class action before a three judge court in the Western District of Texas. They charged that the State of Texas, committed by its constitution to provide a free public school system,[1] was violating the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution by creating and maintaining a system for public school financing which, without justification, provides Plaintiffs' school district substantially less funds than are provided other districts. Plaintiffs charged that despite the fact that great disparities exist between the property tax bases of the various districts, the State of Texas has not only made the amount of funds available to schools dependent upon the local property tax base, with the result that children living in poorer districts are substantially disadvantaged, but has through the use of its Foundation program actually chosen to provide greater supplements to the richer districts,[2] thereby further disadvantaging and dis-

[1] Article 7, § 1 of the Texas Constitution provides that

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

[2] *E.g.*, wealthy Alamo Heights, a San Antonio suburban school district, has a property tax base sufficiently high to have raised $412 per pupil in 1969-70 and it obtained $250 per pupil from the state. The moderate San Antonio North Side district raised $144 per pupil that year from local property tax sources and got $258 per pupil from the State of Texas. Edgewood, the San Antonio

criminating against the children residing in poorer districts.

Plaintiffs originally brought this action on July 30, 1968. The defendants moved to dismiss, but on October 20, 1969, while denying that motion, the court abated further action for two years so as to allow the legislature the opportunity to correct the inequities complained of by the *Rodriguez* Plaintiffs. 337 F. Supp. 280 at 285 n. 11. When the legislature failed to take appropriate steps, the court acted. On December 23, 1971, the court held that the Texas system of school finance unconstitutionally discriminates against the Plaintiff school children. The District Court noted that the present system "tends to subsidize the rich at the expense of the poor" and found that such a system is violative of the Fourteenth Amendment to the United States Constitution. The court itself ordered no new system, since that choice is to be left to the State of Texas:

> Now it is incumbent upon the Defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education. The selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the state as a whole.

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school district in which Plaintiffs reside could raise only $37 per pupil from local taxes but got only $242 per pupil in State aid. Plaintiff's Exhibit 12, based upon computer runs supplied by the State of Texas Education Agency. See also affidavit of Joel S. Berke, Table X; United States Commission on Civil Rights, The Texas School Finance System, pp. 25-31 (1972) (the page cites are to the Commission-approved typewritten copy; publication in printed form is expected in June, 1972) [hereinafter cited as Commission Report].

Defendants filed notice of appeal to this Court and, on April 17, 1972, filed their jurisdictional statement to which Amici now respond.

STATEMENT OF FACTS

Since at least 1845, when Texas was admitted to the United States, the Texas constitution has provided for the support of public education for the State's children.[3] Although the State has varied its financing methods over the years—originally the schools were to be supported by a state property tax and proceeds from the sale of public lands—Texas has for some time supported its public schools primarily with funds raised from school district property taxes. The present case raises in this Court the discrimination which flows from the methods by which Texas finances its educational system. This discrimination arises solely because Texas has chosen to provide revenue based upon a factor—the wealth of the district in which the children reside—which has no relation to any educational goal.

As noted, basic to the Texas school financing scheme is the local *ad valorem* tax based upon the property value of the school district. According to the statistics assembled by the Texas Governor's Committee on Public School Education, there is a wide range of ability of the local school districts to raise funds for the education of their children. For example, the Edgewood District in which Plaintiffs reside has a

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[3] 5 Governor's Committee on Public School Education, The Challenge and the Chance: Public Education in Texas—Financing the System, pp. 11-17 (1969) [hereinafter cited as Public Education in Texas]. The provisions for school financing now appear as Article 7, §§ 2 and 3 of the Texas Constitution.

property tax base of $6,239 per pupil while the Deer Park school district has a base of $144,685 per pupil. Similarly, of the 79 districts with more than 5,000 students, the richest has more than 23 times as much property per pupil as does the poorest. Stated in other words, in order for the poorest and richest districts to raise the same amount for their schools out of local funds, the poorest district must tax itself at a rate 23 times higher than does the richest.

This inequity is not alleviated by the state aid with which Texas supplements the income of the local school districts. The two most important state monies made available to the local school districts are the flat grant (the "Available School Fund") paid to every district, rich or poor, on a per capita basis and the so-called "equalization" grant (the "Foundation Program").

As noted, the calculation of the Available School Fund grant is simple: in 1968-69 it paid each district $97.75 for every child in average daily attendance.[4] The Foundation Program grant is in its particulars very intricate, but its general operation is clear: after subtraction of the $97.75 flat grant given each district under the Available School Fund and a local district share dependent upon the district's tax paying ability, the Foundation Program provides a state subsidy up to a level determined separately for each district. While this Foundation Program is theoretically a partial "equalizer" between the poor and rich districts, the level of the state subsidy bears no particular relation to actual costs and, in addition, is keyed primarily to the qualifications of the teachers employed in the district. Since the wealthier districts tend to

[4] Public Education in Texas 35.

have the resources to attract the more highly-qualified teachers, the level of their state subsidy is higher than that of the poorer districts so that they get more than their fair share and in many instances actually receive more in State "equalizing" funds than do the poor districts.[5] Very rich districts, whose share determined by tax paying ability is greater than the subsidy level determined by the State, get no Foundation grant, but these districts are few. Furthermore, the effect of the Available School Fund flat grant per child is to aid only these few very wealthy districts (since the flat grant is subtracted from the Foundation program grant given the poor districts and in the absence of the flat grant the poorer districts would still receive enough funds from the Foundation program to attain the State subsidy level).

Texas has, in addition, several minor funds available to aid local schools, mainly on a matching basis. The effect of these funds, such as the grant for educational television, is to aid only the rich districts, since the poor districts cannot afford their share of the matching grants. Thus, for example, the Edgewood District obtained no funds under these grants while the richer neighboring districts received thousands of dollars.

The total effect of the state aid to the local districts is succinctly summed up by the statistics for San Antonio, the area from which the case at bar came. Alamo Heights, a rich district which in 1969-70 raised $412 per pupil from its local property tax, received $250 in state aid, while the Plaintiffs' Edgewood District, the poorest in San Antonio, could generate only

[5] See Commission Report, pp. 23-31.

$37 per pupil in local funds but was given only $242 in state aid. Thus, the total effect of the State program is, rather than equalizing the burden, to further advantage the rich at the expense of the poor.[6] This type of system, as Amici note below, is not only unconstitutional, but could be replaced without great practical difficulties.

ARGUMENT[7]

The Decision of the Court Below That the Provisions of the Constitution and Laws of Texas Governing the Financing of Public Education Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution Should Be Affirmed

As the decision of the court below clearly demonstrates, the Texas system of financing public education results in widely differing amounts of funds being available to local school districts for expenditure on public education, depending on the value of the taxable property located in the districts. The higher the value

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[6] See note 2, *supra*. See also Commission Report, pp. 25-31.

[7] In light of Appellants' acknowledgement that summary reversal in this case would be inappropriate, Amici would not normally consider it necessary to file a brief on the merits at this stage in the proceedings. However, an amicus brief written by counsel for the State of Maryland and Montgomery County, Maryland, and signed by various other State Attorneys General and additional counsel recommends summary reversal of the lower court decision in this case. Because Amici, in their capacity as Governors of States, the educational systems of which suffer in varying degrees from the same infirmities exhibited by the Texas system at issue here, are strongly convinced that summary reversal of this case would both be erroneous as a matter of constitutional interpretation and have disastrous consequences on the burgeoning movement to reform state educational financing systems, they feel obligated to present their views on the merits to the Court at this time.

of the property in a district, the more money is available for education at any given level of local tax rates. The Appellants have never contended otherwise.

It is also undisputed that the local school districts and their boundaries, and hence the aggregate value of the property they contain, are entirely the creation of and their maintenance is the responsibility of the State of Texas.[8] Furthermore, the detailed regulation of public education financing by Texas and its active participation through the Available School Fund and the Foundation Program demonstrate that public education in Texas, as elsewhere, is a state not a local responsibility. Indeed, the school districts have the power to raise funds for education only as a result of delegation by the State of its own power to tax for the general welfare.[9]

Thus, the issue in this case is simply whether it is constitutionally permissible for a State to fulfill its self-imposed duty of providing a free education to the children of its citizenry in a manner which discriminates against children and taxpayers who live in poorer school districts. The discrimination occurs because in poor districts the taxpayers are confronted with the alternative of either taxing themselves at rates much higher than those enjoyed by richer districts or of having less tax revenue available to spend on their childrens' education. And an even more invidious discrimination occurs in the case of the poorest districts

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[8] Indeed, there are no less than 385 different articles (sections) in the Texas Education Code dealing with the creation and regulation of school districts down to the minutest detail. 8A Tex. Stat. Ann. pp. 8-24 (index).

[9] See Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-31.

because they cannot raise the necessary revenues by even the most strenuous taxing efforts due to the small amount of taxable property per school-age child and state-imposed maximum tax limits.[10] In short, the poorest Texas school districts, which, as noted above, would have to tax themselves 23 times as hard as the richest to obtain the same revenues because of the inequalities of the system, are prevented by Texas law from making that effort.

It should be re-emphasized that none of the briefs filed on the appeal herein have made any attempt to controvert any of the lower court's findings recited above as to the manner in which the Texas system operates to the disadvantage of children in poorer districts. The reason is apparent: those findings are incontrovertible. Rather, the contentions of those who ask this Court to overturn the decision of the lower court are that there is no federal constitutional impediment to the existing discrimination and that a contrary holding by this Court would produce chaos in public education in the United States. Amici will show that both of these contentions are devoid of merit.

We start from the premise that the Equal Protection Clause of the Fourteenth Amendment applies to state-supported public education. As this Court stated in *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954): "Such an [educational] opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms." In *Brown,* the Court struck down state statutes requiring segre-

[10] The statutory maximum allowed for local taxing efforts varies according to the size of the school district, but is in most cases around $1.75 per $100 assessed valuation. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-31.

gation of the races in the public schools as violative of the Equal Protection Clause. Subsequently, in *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), the Court struck down the Virginia poll tax on the ground that it had the effect, if not the intent, of discriminating against the poor. The Court there stated: "lines drawn on the basis of wealth or property, like those of race [citation omitted] are traditionally disfavored." 383 U.S. at 668.

Read together, *Brown* and *Harper* stand for the proposition that a State may not discriminate against the poor in affording education to its citizenry. Moreover, as *Harper* demonstrates, the discrimination need not be intentional to be unconstitutional if it is the natural outcome of a statutory scheme and if there is no compelling state interest which requires the discrimination. See also *Bullock* v. *Carter,* 40 U.S.L.W. 4211 (1972).

To place the present case in perspective, Amici submit that if Texas were to appropriate monies from general revenue for purposes of education it could not, consistent with the Fourteenth Amendment, distribute that revenue to local districts in direct proportion to the value of the property within each district.[11] Such

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[11] James v. Valtierra, 402 U.S. 137 (1971), is not to the contrary. In that case, the Court held that a provision for local referendums on whether low-cost public housing should be constructed in a community was not violative of the Fourteenth Amendment on the ground that the referendum procedure was one which provided for "democratic decisionmaking" on matters which will "affect the future development of their own community." 402 U.S. at 143. In the present case, in contrast, the State's creation and maintenance of school districts with widely varying tax bases ensures that "democratic decisionmaking" by the inhabitants thereof with respect to their educational needs will be rendered illusory.

a discriminatory distribution of State funds would be unconstitutional because it would have no rational relationship to the goal of providing an education to all the students in the State. *Compare Harper, supra,* at 666, where the Court struck down a State poll tax on the ground that "voter qualifications have no relation to wealth nor to paying or not paying this or any other tax," and *Bullock, supra,* at 4215, where the Court struck down a system establishing high filing fees for primaries, noting that if the "fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal."

Since the State could not discriminate directly against students residing in poorer localities, it should not be permitted to accomplish the same result by dividing its responsibility for equal education with local school districts and failing to supplement the funds raised by the school districts sufficiently to eliminate discrimination.[12]

It is particularly striking to note that although Appellants and the Amici who support them are requesting this Court to reverse the lower court decision holding the Texas system unconstitutionally discriminatory against children in poorer school districts, they do not seek to show that the system is nondiscrimina-

[12] Compare Griffin v. County School Board, 377 U.S. 218 (1964). While a State may delegate certain of its functions to smaller subdivisions such as cities or counties, it cannot escape accountability for their actions. Such subdivisions are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and duration of [their] powers . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907).

tory or that there is any rational basis for the system which relates to its purpose of providing education.[13]

Yet such a showing is required even in cases where what is at issue is regulation of business.[14] Where "sensitive and fundamental personal rights" are involved,[15] particularly where discrimination against the poor is at issue,[16] a more thorough judicial review of the Constitutional validity of the policies supposedly supporting the classification is required. "The essential inquiry in all the foregoing cases, is however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental rights might the classification endanger?" *Weber* v. *Aetna Cas. & Sur. Co.*, 40 U.S.L.W. 4460, 4462 (1972). See also *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965); *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964).

The right to education in a State which provides public education is a fundamental personal right. The aspirations and character of every individual are thoroughly dependent on the education he is able to acquire. Education, like free speech and voting, lies

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[13] In fact, the Texas Governor's Committee on Public School Education found the Texas financing system in question here to be one "which almost defies comprehension." Public Education in Texas 57.

[14] *E.g.*, Allied Stores v. Bowers, 358 U.S. 522 (1959).

[15] Weber v. Aetna Cas. & Sur. Co., 40 U.S.L.W. 4460, 4462 (1972); Eisenstadt v. Baird, 40 U.S.L.W. 4303, 4308 (1972).

[16] *E.g.*, Harper v. Virginia State Board of Elections, 380 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

near the heart of the democratic enterprise.[17] All, or nearly all, States have recognized the peculiar importance of education in this regard and it is for this reason that virtually every State constitution contains a provision similar to the one quoted here from Article 7, § 1 of the Texas Constitution:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

This recognition of the fundamental importance of education by virtually every State, and the resulting State constitutional provisions, eloquently demonstrates the distinction between the significance of education and that of other types of services provided by State and local governments, for no other service is so greatly the subject of State concern. Indeed, for the law's recognition of the special importance of education, there is no better citation than the familiar passage in this Court's historic opinion in *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foun-

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[17] It is for these reasons that States require that individuals undergo education, and that courts uphold these requirements. Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

> dation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Given this unique importance of education, more than unsubstantiated assertions of rationality are required to sustain a system which operates to discriminate against children residing in poor districts solely because of their district's lack of wealth. Compare *Weber* v. *Aetna Cas. & Sur. Co.,* 40 U.S.L.W. 4460 (1972); *Bullock* v. *Carter,* 40 U.S.L.W. 4211 (1972). This burden the Appellants have not satisfied; indeed, they cannot because not only is no compelling State interest served by the present system, but the system is irrational and unnecessary to achieve any legitimate State purpose. Furthermore, the present system could be replaced without great burden, as Amici show below. Thus, the present system constitutes a clear case of denial of equal protection, as a number of recent court decisions have recognized in cases decided upon both federal and state constitutional grounds. *Serrano* v. *Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Sweetwater County Planning Committee* v. *Hinkle,* 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972); *Van Dusartz* v. *Hatfield,* 334 F. Supp. 870 (D. Minn. 1971); *Robinson* v. *Cahill,* 118 N.J. Super. 223, 287 A.2d 187 (1972); *Hollins* v. *Shofstall,* No. C-253652 (Ariz. Super. January 13, 1972).[18]

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[18] Compare Eisenstadt v. Baird, 40 U.S.L.W. 4303 (1972); Lindsey v. Normet, 40 U.S.L.W. 4148 (1972); Reed v. Reed, 404

Appellants evidently base their case for reversal as a matter of law principally on this Court's previous summary affirmances of three-judge district court decisions in *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis* v. *Ogilvie,* 394 U.S. 322 (1969); and *Burruss* v. *Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.,* 397 U.S. 44 (1970). Appellants' reliance on *McInnis* and *Burruss* is, however, sorely misplaced.

In *McInnis,* the court interpreted the plaintiffs' complaint as attacking the constitutionality of the Illinois system of financing public education on the ground that *"only* a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." 293 F. Supp. 337. The court held with respect to the claim so stated that: "There is no Constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student." 293 F. Supp. at 336. In *Burruss* the contentions were similar. 310 F. Supp. at 574.

Amici do not quarrel with the holdings of the *McInnis* and *Burruss* courts set forth above. The difficulty for Appellants, however, is that the present case involves neither a holding that public school

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U.S. 71 (1971). In Dandridge v. Williams, 397 U.S. 471 (1970), the Court found that the Maryland welfare regulations there at issue were "rationally based and free from discrimination." 397 U.S. at 487. That decision offers no support for overturning the lower court's decision here because the Texas system both discriminates against the poor and lacks a rational basis for so doing.

expenditures must be based solely on pupils' educational needs nor a requirement of equal dollar expenditures per student. In fact, the present case involves no requirement concerning *expenditures* at all. All the lower court held here is that there is no rational basis to support a system of financing of public education in a manner which concededly operates to the disadvantage of children who live in poorer districts. It is to be noted that the court left the State of Texas free to adopt whatever system of financing it prefers, so long as it does not discriminate on the basis of wealth. This holding, Amici submit, is both correct and constitutionally required for the reasons discussed above.

Appellants and the Amici supporting their position seek to avoid the impact of the constitutional requirements by assertions that an affirmance of the lower court decision would have catastrophic effect on State public education. Amici are in a particularly good position, as State Governors active in the area of school finance reform, to evaluate the accuracy of these predictions and have no hesitation in stating to this Court that such predictions are without merit. Appellants make the following arguments, which Amici will discuss seriatim:

1. It is asserted that the lower court decision "would adversely affect the quality of public education in the state." (Ap. Br., p. 8). According to this assertion (no factual data is adduced in support), Texas would be confronted with a choice between providing each district with the same amount of funds available to the richest district in the State or in cutting back on the funds available to schools in the richest districts (which are described by Appellants as the "best"

schools) so as to transfer funds to schools in the poorer districts (the "worst" schools, according to Appellants). Appellants' assertions here are based upon the premise that "equalizing amounts spent on education on a state-wide basis would almost certainly be done at a level that would not significantly increase the overall expenditure for education." (Ap., Br., p. 8).

This line of argument is without merit, for a number of reasons. First, it depends on the assumption that statewide taxation of property, for example, would raise funds equal to or less than those currently raised. That is by no means clear since even if the statewide tax rate were no higher the average rate currently imposed by the school districts, the increased revenue from the wealthy districts which pay very light taxes under the current system might well outweigh any loss from the currently overtaxed poor districts and make more funds available than under the present system.[19]

Second, it is assumed that if an equalized system would in fact result in less funds for the wealthier districts, the State would lose interest in increasing expenditures for education. In light of the fact that the inhabitants of the wealthier school districts are by and large the persons who control political power in any State, an assumption that they will not exercise that power to increase educational expenditures statewide to a level that will provide their own children with the funds they consider necessary for good education seems unwarranted.

Third, this contention assumes that Texas would be required, under the lower court decision, to pay a per pupil dollar amount equal in each district. That is not

[19] See 1 New York State Commission on the Quality Cost and Financing of Elementary and Secondary Education, Report 2.26 (1972).

so, as Amici point out below. What Texas cannot do is pay a school district an amount based solely upon the district's wealth. There is nothing to prevent Texas, if it so chooses, from conditioning equal payments on equal local taxing effort, for example, which would leave the local community to decide whether it wished to pay for "quality" schools.

Finally, it should be noted that the Appellants' argument, in its essentials, is that the poor can be discriminated against so that the rich may be better off. This is not and cannot be a principle of constitutional law. The "good" (wealthy) schools presently receive more State funds for education than they are entitled to. No court decision, including that of the court below, bars or will bar a State from affording "quality" education to *all* of its children. And unsupported contrary assertions by Appellants and others will not change this fact.

2. Alternatively, and inconsistently, those who would have this Court reverse the decision below maintain that nondiscrimination would involve a tremendous increase in educational expenditures. This is not so. While it is true that if a State chooses to equalize all schools at the level of spending now enjoyed only by the wealthiest districts there would be an increase in educational outlays—although not a tremendous one—a State is free to choose the level of equalization to insure that there is little cost increase. The President's Commission on School Finance has recently completed a study of this subject which included a thorough analytical treatment of the cost factors involved.

According to the President's Commission, Texas, which currently spends over $1.5 billion annually on

its schools, would increase costs no more than $40 million by converting to equalized schools if it chose to equalize payments at the 50th percentile.[20] This amounts to an increase of around 2.6%—less than that required annually from inflation alone. Nationwide, the figures are similar. Thus, in the United States, which spends $45 billion annually on education,[21] the additional costs involved in equalizing at a 50th percentile level amount to $1.3 billion, an increase in outlay of less than 3%. Of course, if States choose to equalize at higher levels—that is, in Appellants' terms, decide to make high quality education available for all—the costs will increase. But even so, the increases required are not prohibitive. Thus, if Texas chooses to equalize at the 70th percentile, its increase in costs would be $92 million (6.1%) and at the 90th percentile that increase would be $263 million (17.5%). Similarly, nationwide, the cost if all States choose to equalize at the 70th percentile would increase by $2.5 billion (6%) and at the 90th percentile by $6 billion (15%).[22]

While Amici do not submit that these are necessarily small figures, they do show that the order of magnitude of expenditures necessary to equalize our schools even at the level of the very best is not overwhelming and that to maintain a school system in which the overall quality is higher than the average now but which does not discriminate against the poor

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[20] 2 Staff Report, President's Commission on School Finance Reform, Review of Existing State School Finance Programs 15 (1972) [hereinafter cited as Staff Report].

[21] President's Commission on School Finance, Schools, Money & People: The Need for Educational Reform 11 (1972).

[22] Staff Report 15.

need cost almost nothing more than we are presently paying.

3. Appellants also raise the spectre of a mass flight from the public schools by the children of those who already object to having their children attend school with blacks and other members of minority groups. Not only is it singularly unattractive to propose that this Court trade off discrimination against the poor in exchange for eliminating racial discrimination, but this contention is factually erroneous.

First, perpetuating discrimination against the poor in education financing will hardly promote the use of the public schools to achieve "a society that is not divided by artificial barriers of race or class or wealth." (Ap. Br., p. 9). On the contrary, it is precisely the existence of school districts in which high property values, low tax rates and ample funding for public education coincide that is the principal cause of the creation of residential enclaves from which the black and the poor are excluded. Second, as the attempts to avoid desegregation have shown, the fact that persons who place their children in private schools are still taxed to support public schools operates as a substantial deterrent to "flight away from the public schools" by all but the richest.

4. There are, in addition, references to the effect of the lower court decision on local control of schools, private property rights, continued viability of the State governments, and so forth. While Amici do not believe that these points require any lengthy discussion, it is appropriate here to point out that the court decision below and the standard it finds constitutionally required do not interfere with local admin-

istrative control of the schools in any way. What the court below held is merely that the State must provide for financing in a non-discriminatory manner. This in no way deprives local school districts of such control over curriculum, personnel, and other academic decisions as the State may choose to grant to the districts. Indeed, under the standard adopted by the court below the poor school districts will for the first time have the chance for the meaningful local control which the lack of resources due to financial discrimination under the present system has made impossible.

In closing this section of their Brief, Amici would re-emphasize that the constitutional standard adopted by the court below—correctly in our view—does nothing more than require the State to stop using a system which discriminates against the children residing in poor districts. It does not require that the State utilize any particular means of financing. Rather, it sets forth the basic constitutional standard and quite properly leaves it to the State to make the policy decisions as to which of the many ways of school financing it will adopt.

Consistent with the decision of the lower court, there are many financing arrangements the State could adopt. The basic structures of some of these variations include:

1. A uniform formula, whereby the State grants each district the same amount per pupil;

2. "Power equalizing," whereby the State assures that each district receives equal funds for equal local tax effort;

3. Variation by cost of services, whereby the State pays more to those districts (generally urban ones) where costs are higher;

4. Combination formulae, whereby the State pays a uniform amount under either formula 1 or formula 3 above and allows the districts additional leeway to spend more, for example, under formula 2.

The four formulae mentioned above are merely a few of those available. There are, in addition, many other factors that the State could consider in adopting a particular financing program. These include variations in educational need (such as programs for the handicapped), educational innovation and experimentation, and municipal overburden (that is, since urban areas are harder pressed to provide all the necessary municipal services than are rural areas, the urban areas may require additional aid). None of the formulae suggested above, nor the variations thereon, are of great administrative difficulty and any of them could, based upon a State's policy decision as to how best to spend the funds available to it, form the basis of an adequate and constitutional school financing system.

CONCLUSION

The principal interest of Amici in filing this brief is to insure that this Court in the present case does not, in effect, endorse the existing defects in the financing of public education in the various States, including those governed by Amici. Amici believe, and the court below recognized, that the discrimination against poor children which results from such a system of school

financing is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and must be eliminated. Each Amicus herein is presently engaged in drafting and seeking the passage of legislation which would eliminate this discrimination against poor children. While constitutional law obviously cannot be made for the sole purpose of supporting legislative reform efforts, it is equally true that constitutional law should not thwart such efforts, particularly where, as in the present area of school financing, the absence of legislative reform is attributable to the entrenched political power of persons who most benefit from the inequalities of the status quo. As Amici have pointed out elsewhere in this Brief, the standard applied by the lower court allows many possible school financing systems, the details of which are properly to be filled in by the State according to its policy determinations. For the foregoing reasons, Amici believe that the decision of the court below is correct.

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May 17, 1972

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR APPELLANTS

Appellants appeal from the judgment of the United States District Court for the Western District of Texas entered on December 23, 1971, and from the clarification of that judgment entered on January 26, 1972.

Opinion Below

The opinion of the District Court for the Western District of Texas is reported at 337 F.Supp. 280. The opinion and judgment and the clarification of the original opinion and judgment are in the separately-bound Appendix (App. 259).

Jurisdiction

This suit was brought under 28 U.S.C. §§ 1331 and 1343 for a declaratory judgment and an injunction against enforcement of Article VII, § 3, of the Texas Constitution and the sections of the Texas Education Code relating to the financing of education. A statutory

three-judge court was convened pursuant to 28 U.S.C. § 2281. On December 23, 1971, that court entered its judgment granting an injunction as prayed for by the plaintiffs. A motion for clarification was filed by the defendants on December 28, 1971, and on January 26, 1972, a new judgment was entered on behalf of the three-judge court to make clear that the judgment does not affect the validity or enforceability of outstanding school district bonds or of those that may be issued in the next two years. Notice of appeal was filed in the District Court on February 16, 1972. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Probable jurisdiction was noted on June 7, 1972. — U.S. —.

Question Presented

Whether Section 3 of Article VII of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of education violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions

The relevant provisions of the Constitution and statutes of the State of Texas are set out in the Appendix (App. 276.)

Statement of the Case

This action was brought as a class action on behalf of Mexican-American school children and their parents who live in the Edgewood Independent School District in Bexar County, Texas, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Numerous state and local officials and school districts were named as defendants. Plaintiffs claimed that the present system

of financing public schools in Texas is discriminatory because it makes the quality of education received by students a function of the wealth of their parents and neighbors as measured by the tax rate and property values of the school district in which they reside. They further claimed that the system discriminates against school districts in which there is a high percentage of Mexican-Americans.

Although the details of the Texas system for financing public education are extremely complex, the general plan can be fairly readily described. It is of the sort known to educators as a "foundation plan." In essence, it is a combination of ad valorem taxes levied by school districts with a state contribution that is intended to assure that every child in the state has at least a minimum foundation education. The state contribution is calculated in a fashion that has a mildly equalizing effect.

The heart of the Texas system is the Minimum Foundation Program. TEXAS EDUCATION CODE §§ 16.01 *et seq.* Under that program more than a billion dollars a year is provided to cover the costs of salaries of professional personnel, school maintenance, and transportation. Eighty percent of the amount to which a school district is entitled under the Minimum Foundation Program is paid by the state from general revenue. The balance of the cost of the minimum program comes from the school districts under the Local Fund Assignment. TEXAS EDUCATION CODE §§ 16.71-16.73. An economic index is used so that each county's contribution to the Local Fund Assignment approximates that county's percentage of statewide taxpaying ability. TEXAS EDUCATION CODE §§ 16.74, 16.76. Within each county the portion of the Local Fund Assignment that each school district is expected to contribute is the percent-

age of the county's assignment that the value of the property in the school district is of the value of all of the property in the county. TEXAS EDUCATION CODE § 16.76. Thus, while the state contributes, on an overall basis, 80% of the cost of the Minimum Foundation Program, in some districts that lack the ability to raise substantial funds by local effort the state contribution is in excess of 98% of the cost of the Minimum Foundation Program while in districts with greater ability to pay the state contribution is less than 80%.

Each district is then free to supplement the minimum program with additional funds raised by local ad valorem taxes. TEXAS EDUCATION CODE §§ 20.01 *et seq.* In combination, the Texas plan assures every child in the state of a certain minimum level of education on a nondiscriminatory basis but allows each local school district to provide educational benefits above the minimum to the extent that the district wants them and can afford them.

The court below ignored, quite properly, the claim of discrimination against Mexican-Americans. It accepted, however, the plaintiffs claim that the Texas plan is unconstitutional because "wealthy" school districts can and do spend more per child for education than do "poor" school districts. It held that the Equal Protection Clause of the Fourteenth Amendment embodies a standard of "fiscal neutrality," which means that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." The court enjoined enforcement of the Texas laws on the financing of education "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole." It ordered defendants to reallocate the funds available for financial support of the school system, including local

ad valorem taxes, in a fashion consistent with what it thought to be required by the Equal Protection Clause. It stayed its mandate for two years to give the defendants and the legislature an opportunity to take all steps reasonable feasible to make the school system comply with the applicable law as it had declared it and included language in the clarification of its judgment intended to make it clear that its order does not affect the validity of school bonds and similar financial obligations already issued or that may be issued within the two year period of the stay.

Summary of Argument

In a book published two years ago three scholars announced what they called Proposition I, "the quality of public education may not be a function of wealth other than the total wealth of the state." COONS, CLUNE, & SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970). The District Court has held that that proposition is required by the Equal Protection Clause. Because it found that in Texas there is a correlation between the value of taxable property per student and the amount spent per student, it held that Proposition I was violated and that the Texas system of school finance, which is in essence the same as that used in at least 48 other states, is unconstitutional.

The decision below combines unsound factual assumptions with erroneous law. The District Court assumed, without discussion, that "quality is money" and that per student expenditures are an adequate measure of the quality of a student's education. There is no proof that this is so and much reason to think it is not so. The District Court found as a fact that there is a positive relation between taxable value per student and income in a district and thus that the figures on taxable value are an adequate indicator of ability to

pay. The evidence it cited does not support that finding and there is much evidence to show that this is not the case.

On the law, the District Court accepted the simplistic argument that education is a "fundamental" interest and that wealth is a "suspect classification." From this it concluded that the Texas system could be upheld only if a "compelling state interest" supported it, which it found not to be the case. There is, as the inventors of Proposition I recognize, no direct authority that education is a "fundamental" interest in this sense or that wealth is a "suspect classification." Such recent cases as *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *James* v. *Valtierra,* 402 U.S. 137 (1971), *Gordon* v. *Lance,* 403 U.S. 1 (1971), *Lindsey* v. *Normet,* 405 U.S. 56 (1972), *Wisconsin* v. *Yoder,* 92 S.Ct. 1526 (1972), and *Jefferson* v. *Hackney,* 92 S.Ct. 1724 (1972), are contrary to the legal premises of the decision below and support the view that the orthodox "rational basis" test is the measure under the Equal Protection Clause of state legislation in the area of economics and social welfare, even when that legislation bears on the most basic needs of the poor.

The Texas finance system has a rational basis. It assures every child an adequate education and leaves it to individual districts to go beyond that minimum as their desires and resources permit. To impose on Texas and the other states a constitutional straitjacket that would prevent localities from spending additional sums on education as they see fit would destroy the important value of local autonomy and would have dangerous consequences for the public schools.

Argument

The court below has extracted from the Equal Protection Clause a new constitutional standard of "fiscal

neutrality," which requires that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole" (337 F.Supp. 280, App. 259). Measured against this standard the method of school financing used in Texas—and in most or all of the other states—has been found wanting and stricken down as unconstitutional.

The proposition announced by the court below is one discovered only recently. Indeed it is said that the first suggestion of the unconstitutionality of school financing systems did not appear in the literature until 1965,[1] but it has since been promoted by a "wave of consciously activist scholarship, written with an avowed bias, and aimed at producing specific legal results." Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v. Priest and Its Progeny,* 120 U.PA.L.REV. 504, 512 (1972). The most influential product of that scholarship has been an engaging and provocative book by Professors John E. Coons, William H. Clune, III, and Stephen D. Sugarman, PRIVATE WEALTH AND PUBLIC EDUCATION (1970)[2] (cited hereafter as PRIVATE WEALTH). In that book they an-

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[1] A commentator friendly to the new development has described its origin:

> In February 1965 a short notice by Arthur E. Wise entitled "Is Denial of Equal Educational Opportunity Constitutional?" appeared in *Administrator's Notebook.* Although the subject generally was in the air, this appears to be the first published suggestion that the present system of financing public education is unconstitutional. There followed a rash of articles, dissertations, books and book reviews—criticizing, developing, and sharpening the analysis, and providing new materials and ideas.

Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?,* 1 J. LAW & EDUC. 73, 81 (1972).

[2] While PRIVATE WEALTH was at the press a shortened form of it appeared as Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test For State Financial Structures,* 57 CALIF.L.REV. 305 (1969).

nounced what they called Proposition I, that "the quality of public education may not be a function of wealth other than the total wealth of the state." *Id.* at 304.

The argument of Professor Coons and his associates was accepted by the California Supreme Court in the celebrated case of *Serrano* v. *Priest*, 5 Cal.3d 584, 487 P.2d 1241 (1971). It has had successes elsewhere. In the present case, the court below has taken Proposition I, with only an insignificant verbal change, as the exact measure of what the Equal Protection Clause requires in this area. Rarely, if ever, in the history of the Republic has a novel idea proceeded in such a short time from announcement by imaginative scholars to enshrinement in the Constitution of the United States.

PRIVATE WEALTH is a splendid scholarly achievement. It has been the catalyst for widescale rethinking of the problems of financing public education. Its analysis of what its authors perceive as the flaws in existing financing schemes and its presentation of the remedy they propose might well prove persuasive to legislators. The issue here, however, is whether these ideas, and those of similar contemporary critics, must be accepted by constitutional mandate.

Because of the unusual background of this case, and of the constitutional principle it announces, it does not lend itself readily to the usual form of appellate brief, in which Roman-numbered topic sentences proceed in syllogistic splendor to the inevitable conclusion. Instead, after stating the nature of the problem and of the critics' argument directed to it, we will consider the unsound factual assumptions on which that argument is based, the fatal weakness of the legal analysis offered in its support, and the dangerous consequences that would follow if it were to be read into the Constitution.

I. The Problem

The proper financing of public education has long been a vexing problem in this country. In almost every state the pattern has been one of constantly increasing expenditures on education coupled with much soul-searching as legislatures have sought to assure that the money is equitably distributed and wisely spent and that each child receives an adequate education. Throughout the country between 1960 and 1970 expenditures for public education increased 153% while enrollment was increasing only 30%. Select Committee on Equal Educational Opportunity, United States Senate, 92d Cong., 2d Sess., The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance 7 (Comm.Print. 1972). In Texas, the increase in expenditures in that period was from $750 million to $2.1 billion, while the number of students increased only 37%, so that expenditures per student doubled from $416 to $855. Texas Research League, Public School Finance Problems in Texas 2 (1972).

The vast sums involved have caused the states, the federal government, and many interested persons and groups to take very hard looks at how this money is allocated and spent. "Dissatisfaction, crisis, urgency—these words have become painfully common in the lexicon of American education. No one who has observed or participated in education recently need be told how frequently, how widely, and how aptly they are used." President's Commission on School Finance, Schools, People, & Money 6 (1972). The dramatic changes that have taken place in American life have intensified these looks but the pattern of periodic re-examination of the school finance system and of changes in it to conform to new needs and to take advantage of new insights is an American tradition.

Texas is fully in accord with this tradition. When Texas was admitted to the Union in 1845, its first state constitution authorized state financial support for a system of free schools and the system by which this support is provided has been revised repeatedly over the years. For the last half-century every decade has seen the legislature commission at least one special committee to evaluate the public schools and make recommendations concerning them. The system now in use in Texas the result of the work of the Gilmer-Aikin Committee in 1948, though changes have been made in response to the findings of the Hale-Aikin Committee in 1958, and the Governor's Committee on Public School Education in 1968. GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE 2 (1968). Nor has the process of self-examination stopped. The Texas Education Agency has task forces studying five different aspects of public education in Texas, and other studies by highly qualified groups are being made under the auspices of a Texas Senate Committee, the Texas State Teachers Association, and the Texas Research League. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 19 (1972). Whatever else may be said about school finance in Texas, it is not a subject that suffers from lack of attention. The commitment in Texas to educational excellence for all of the public school children in the state is a strong one. Indeed the subtitle of the 1968 report of the Governor's Committee on Public School Education was: "To Make Texas A National Leader in Public Education."

In Texas, as in every state except perhaps Hawaii,[1]

[1]Hawaii, in which there is only one school district operated by the state Department of Education, is frequently cited as an exception. E.g., PRIVATE WEALTH 149; Shanks, *Book Review*, 84 HARV.L.REV. 256, 257 n. 14 (1970). But in 1968, "in order to allow counties to go above and beyond the State's

local school districts administer the schools and local taxes, raised by the school districts, pay at least a part of the costs of education. It did not require the publication of PRIVATE WEALTH to demonstrate that there are wide variations in the taxable property in different school districts and thus that the amount districts can raise through ad valorem taxes differs from one district to another. This has been the reason for the many studies in Texas, as in other states. The state has repeatedly sought to find a formula for state aid that would assure a sound education for each child while taking into account the differences in ability to pay of different districts.

No one familiar with the Texas system would contend that it has yet achieved perfection. Indeed, a principal impetus for the ongoing effort in Texas to refine and improve the system is a frank recognition that there are still defects in it. See, e.g., GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, THE CHALLENGE AND THE CHANCE 58-69 (1968). But Texas does not stand condemned by the court below because it has failed to achieve the goal that it, in company with other states, has set for itself. Plaintiffs do not claim, nor did the District Court find, that they are not receiving an adequate education. Nor does the attack center on the imperfections and anomalies in the complicated formulae by which the state assists public education. Instead the contention, and the holding below, is that ever since the adoption of the Fourteenth Amendment in 1868 the state has been pursuing an unconstitutional goal. The state must abandon its effort to provide an

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standards and provide educational facilities as good as the people of the counties want and are willing to pay for." Hawaii authorized counties to use their funds to supplement state funds for the construction of school improvements, maintenance of school facilities, and transportation of school children. Act 38, Haw. Sess. Laws (1968).

adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able, and instead must turn on to the recently-charted trail of "fiscal neutrality."

2. THE CRITICS' POSITION

The heart of the argument now being advanced against traditional methods of school financing is that the number of dollars per pupil available to a school district is correlated with the market value of taxable property per pupil in that district. Plaintiff's Table V (App. 208), based on 1967-68 figures for a sample of 110 districts, makes the point, showing, on a per pupil basis, the market value of taxable property in the districts and the amount and sources of revenue:

Market Value	Local	State	State & Local	Federal	Total
Above $100,000 (10 Districts)	$610	$ 205	$815	$ 41	$856
$100,000-$50,000 (26 Districts)	287	257	544	66	610
$50,000-$30,000 (30 Districts)	224	260	484	45	529
$30,000-$10,000 (40 Districts)	166	295	461	85	546
Below $10,000 (4 Districts)	63	243	305	135	441

Plaintiffs' Table X (App. 219) offers similar figures for selected districts in Bexar County, with the market value per pupil in each of those districts added from Plaintiffs' Table VII (App. 216)

Alamo Heights ($49,478)	$333	$225	$558	$ 36	$594
North East ($28,202)	182	233	415	53	468

San Antonio ($21,944)	134	219	353	69	422
North Side ($20,794)	114	248	362	81	443
Harlandale ($11,345)	73	250	323	71	394
Edgewood ($5,960)	26	222	248	108	356

As will be discussed in the next section, plaintiffs assume that dollars per student is a measure of the quality of education and that market value of taxable property per student is a measure of the wealth of the district. On these assumptions, plaintiffs argue, and the District Court has found, that the quality of education a child in Texas receives is a function of the wealth of his district[1] and find this to be constitutionally impermissible.

The constitutional argument is a simple one. Education, so it is said, is a "fundamental interest." Wealth is a "suspect classification." The critics, and the court below, then invoke "the converging persuasions of the 'fundamental interest' and 'suspect classifica-

[1]This is not an inevitable conclusion, even given the required assumptions. It may well be that both market value per student and the amount spent per student are a function of a third variable, such as the number of students in a district. The following figures are taken from Table XIX in GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION, FINANCING THE SYSTEM 55 (Research Report No. 5, 1969). They show, in terms of school district size, the market value per student, the amount of state aid per student, and the total cost per student of the Minimum Foundation Program.

Fewer than 500	$121,000	$318	$415
500-1,599	79,000	271	346
1,600-2,599	51,000	258	318
2,600-4,999	48,000	255	312
5,000-9,999	43,000	232	304
10,000-39,999	28,000	242	290
More than 40,000	36,000	219	287
STATE TOTALS	47,000	245	309

tion' test—classification by wealth of school districts is constitutionally suspect when it affects the enjoyment of a fundamental interest * * *." Coons, Clune, & Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 113 (1971). The system, on these premises, can stand only if it is justified by a "compelling state interest." Since the state cannot meet that rigorous burden, the system is unconstitutional.

To this point the critics, and those courts that have adopted their argument, make common cause. It is less clear what is to happen to a state when it has been told that Proposition I is the supreme law of the land. This has not been a problem for the courts. The court below told Texas that it might choose "from a wide variety of financing plans" (337 F.Supp. at 285, App. 279), without pausing to specify what they might be. Another federal judge thought that Proposition I "allows free play to local effort and choice and openly permits the State to adopt one of many optional school funding systems which do not violate the equal protection clause." *Van Dusartz* v. *Hatfield,* 334 F.Supp. 870, 877 (D.Minn. 1971). The literature abounds with helpful suggestions. The leading authors are able to list "twelve examples" of financing schemes that they would think consistent with Proposition I.

Unfortunately "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next." *Wolf* v. *Colorado,* 338 U.S. 25, 41 (1949). Many of the commentators, for example, have listed as a possible remedy redrawing district lines so that each school district in a state would have the same amount of taxable property within its borders. Fortunately no one takes this possibility—compared to which legislative reapportionment is child's play—seriously.

Undoubtedly a great many variations in detail are possible but the literature indicates that there are only two principal kinds of solutions that might satisfy the principle of "fiscal neutrality." One would be for the state to draw on the resources of the state as a whole and allocate funds to schools or school districts. This could, but need not necessarily, mean "one kid, one buck." Apparently the state could take account in its allocation such factors as the differing cost of high school and of grade school education, special programs required for the disadvantaged, varying living costs throughout the state, the need for transportation where it exists, and like matters. But the important point with regard to this solution—for which Professor Arthur Wise has been the leading advocate, e.g., WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1969); Wise, *School Finance Equalization Lawsuits: A Model Legislative Response,* 2 YALE REV. OF LAW & SOCIAL ACTION 123 (1971)—is that only the amount allocated by the state, by whatever formula, could be spent and that no district would be permitted to supplement this subvention from its own resources.

Professor Coons and his associates opt for a different solution, which they call "district power equalizing." PRIVATE WEALTH 201-242. Under this plan each district would decide for itself the rate at which it wishes to tax for education. The state would guarantee a stated number of dollars per pupil for any given tax rate (and might set a minimum or a maximum rate or both). If in a particular district the chosen rate failed to produce the number of dollars promised in the state formula the state would make up the difference, while it would recapture the surplus from other districts in which that rate produced more than the necessary dollars.

As we shall see later, there is sharp division among the prophets, seers, and revelators of the new dispensation about these competing solutions. Professor Wise and those aligned with him think that "district power equalizing" would be unconstitutional[1] while Professor Coons and his associates are almost equally critical of the solution pushed by Professor Wise.[2] For present purposes, it is enough merely to note that these are the two kinds of ways in which scholars have suggested a state might comply with Proposition I.

3. The Unsound Factual Assumptions

Before turning to analysis of the legal argument made in support of Proposition I, it is well to consider some of the factual assumptions on which the argument rests, for the ruling of the court below takes the courts deep into a "thorny fiscal and educational thicket." Select Committee on Equal Educational Opportunity, United States Senate, 92d Cong., 2d Sess., The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance 34 (Comm. Print 1972).

It is central to the argument of the reformers that, as they succinctly put it, "quality is money." Private Wealth 25. All of the elaborate tables and computer printouts are meaningless unless dollars spent per student are an adequate measure of educational quality. Thus, though Professor Coons and his friends recognize that "the basic lesson to be drawn from the experts at this point is the current inadequacy of social science to delineate with any clarity the relation between cost and quality," *Id.* at 30, their thesis requires that they continue "to assume that dollar expenditures

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[1] See pp. 45-46 below.

[2] See p. 44 below.

per pupil constitute a reasonable measure of quality in education." *Id.* at 304.

It is not, however, the custom of courts to let assumption substitute for proof when they are asked to decide great issues. The California Supreme Court recognized that there is "considerable controversy" about the assumption but was able to avoid the problem on procedural grounds. The case before it arose on demurrer and the court ruled that, in that posture, the demurrer admitted the allegation of the complaint about the relation between quality and money,[1] *Serrano* v. *Priest,* 5 Cal.3d 584, 601 n. 16, 487 P.2d 1241, 1253 n. 16 (1971). The case in federal court in Minnesota arose on a motion to dismiss for failure to state a claim and there too the court was able to hold that the allegation of the pleading was admitted. *Van Dusartz* v. *Hatfield,* 334 F.Supp. 870, 873 (D.Minn. 1971). It is interesting, however, that when the Minnesota court announced its adoption of Proposition I it stated it in terms of "the level of spending for a child's education," *id.* at 872, rather than "the quality of public education," as it is put in the Coons' book and by the court below.[2]

The District Court in the present case could not avoid this issue by a procedural device, since it was giving judgment on the merits rather than passing on a pleading motion. There was conflicting testimony before it on whether quality of education can be meas-

[1]See Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 520-521 (1972), suggesting that a conclusory allegation of the sort in question is not admitted by demurrer.

[2]One commentator says that *Van Dusartz* "improved on the original proposition" because it dropped "the subterfuge about quality * * *." Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education,* 2 YALE REV. OF LAW & SOCIAL ACTION 133 n. 7 (1971).

ured by dollars spent (Graham and Stockton Depositions). It chose to ignore the problem. Although its opinion assumes that "quality is money," that issue is never discussed.

It is reasonable to suppose that there is some minimum sum of dollars beneath which a sound education cannot be had. Brest, *Book Review*, 23 STAN.L.REV. 591, 610 (1971). Beyond that minimum it cannot be assumed that more dollars means better education—and there is considerable reason to doubt that there is any relation between the two. The Coleman Report, made in response to direction by Congress in the Civil Rights Act of 1964 and one of the largest surveys in the social sciences in recent time, could not find evidence of the relation:

> Differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude.

OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY 316 (1966). Naturally that report aroused controversy among professional educationists, who were unhappy at having doubt cast on their long-cherished beliefs, but its conclusions have not been shaken. See Mosteller & Moynihan, *A Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 36 (Mosteller & Moynihan eds. 1972; Jencks, *The Coleman Report and the Conventional Wisdom*, in *id.* at 69.

A recent Presidential Commission could not make the leap that the court below made in the present case. It said:

> The relationship between cost and quality in education is exceedingly complex and difficult to document. Despite years of research by educators and

economists, reliable generalizations are few and scattered.

PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY x (1972). That same Commission again cast doubt on what everyone "knows" to be true when it said that "[t]he conviction that class size has an important or even a measurable effect on educational quality cannot presently be supported by evidence." *Ibid.* Another scholar has recently summarized studies showing that "class size has no impact on learning" and that "the *higher* the expenditures per pupil—and the *smaller* the class size—the *lower* are pupil achievements—and vice versa." Freeman, *Should Local School Support Be Abolished?,* 38 VITAL SPEECHES 465, 467 (1972) (emphasis in original).

A state trial court in Michigan, sitting in effect as a special master for the Michigan Supreme Court, was charged with finding the facts about school finance so that the appellate tribunal might pass on a school financing case. The evidence presented to it reflected a negligible correlation between educational spending and educational achievement but a substantial correlation between social class and educational achievement, confirming in this respect the findings of the Coleman Report. The court found that "there is a low statistical relationship between monetary inputs and achievement output." *Milliken* v. *Green,* No. 13664-C (Mich. Cir. Ct., Ingham County, May 8, 1972). A consultant to the Senate's Select Committee on Equal Educational Opportunity draws the following conclusion from the research studies thus far conducted: "The magnitude of school expenditures, per se, has not been shown to correlate significantly with pupils' academic performance." Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1387 (1971). Two officers of the Urban Institute tell us that "with our

present knowledge, there seems to be little reason to believe that increased expenditures per pupil are sufficient conditions for improved educational opportunity. Whether they are necessary conditions is also unclear." Bateman & Brown, *Some Reflections on* Serrano *v.* Priest, 49 J. URBAN L. 701, 703 (1972).

The unproven assumption that "quality is money" in itself is a fatal flaw in the argument for Proposition I. But there is almost as much reason to doubt the other assumption of the argument for Proposition I, that the market value of taxable property per pupil is an adequate measure of "wealth." Professor Coons and his associates have noted that "it is very difficult to specify the degree to which personal and school district wealth coincide." Coons, Clune, & Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 114, (1971). In their book they make a sophisticated argument that it is not neccesary to demonstrate a relationship here, and that discrimination against a district that is "poor" in terms of taxable property is unconstitutional even if the families in the district are individually rich. PRIVATE WEALTH 152-156.

That argument weakens the general case for Proposition I, however, since the contention that "wealth" is a "suspect classification" is drawn from cases that are concerned with individual wealth, not with the collective wealth of a territorial subdivision. The District Court on this point, in contrast with its failure to discuss the relation between quality and money, made a finding favorable to the plaintiffs. It said:

> As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are low in income and predominately minority in composition.

(337 F.Supp. at 282, App. 259.) This finding was based on Table VII in Plaintiffs' Exhibit VIII, presented in an affidavit from plaintiffs' expert, Professor Joel S. Berke. The table is as follows:

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	State & Local Revenues Per Pupil
Above $100,000 (10 Districts)	$5,900	8%	$815
$100,000-$50,000 (26 Districts)	4,425	32	544
$50,000-$30,000 (30 Districts)	4,900	23	483
$30,000-$10,000 (40 Districts)	5,050	31	462
Below $10,000 (4 Districts)	3,325	79	305

We cannot improve on the comment on this table, and what it does or does not establish, of Professor Stephen R. Goldstein, and accordingly quote his comment:

> The 5 category breakdown of school districts seems to be arbitrary, and it is only this breakdown which appears to produce the correlation of poor school districts and poor people. Even on this breakdown, however, the correlation is doubtful. Note the very small number of districts in the top and bottom categories. Even more significant is the apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall. While the family income differences among the 3 groups of districts are small, they may be even more significant if categories are weighed by the number of districts in each. At the very least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiant; this is, however, the study the

court relied upon, and it is apparently the only study which purports to show such correlation.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 524 n. 67 (1972).

There is also evidence on this point elsewhere that casts further doubt on the determination on this point by the District Court. That evidence may properly be considered by this Court since the supposed correlation between poor people and "poor" districts is a question of "legislative fact," properly the matter of judicial notice, rather than a question of "adjudicative fact." MCCORMICK, EVIDENCE § 331 (2d ed. Cleary et al. 1972).

The results of a study of the situation in Kansas are presented in Ridenour & Ridenour, *Serrano* v. *Priest: Wealth and Kansas School Finance,* 20 KAN.L.REV. 213 (1972). The conclusion there is that

> there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil.

Id. at 225. In addition to figures drawn from a large sample, the authors draw a particularly interesting contrast between two selected school districts, one in a fast-growing urban area (Shawnee Mission) and the other in a rural area that is losing population (Kendall). Shawnee Mission has an equalized value per pupil of $9,522. Despite a tax rate of 51.1 mills, and somewhat more state aid than Kendall, it is able to spend only $664 per pupil. Kendall, with a valuation of $79,672 per pupil, taxes at a rate of only 14.71 mills, but still is able to spend $1,573 per pupil. This sounds like the prototype of the situation that the court below

held to be unconstitutional, discrimination "on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes * * *" (337 F.Supp. at 285, App. 259). But other facts change the picture. In Shawnee Mission the taxable income per pupil is $8,765 while in Kendall it is only $3,260. Kendall spends far more per pupil than does Shawnee Mission—as is probably inevitable in a very small school district with no economies of scale—but it does so only by paying 19% of its citizens' adjusted gross income in property tax, while in Shawnee Mission only 6% of income goes for this purpose. *Id.* at 225-226.

The Kansas authors point also to an earlier study of California counties, testing the assumption that assessed valuation per pupil is a measure of ability to pay taxes. That study showed no direct correlation between "wealth" per pupil and income per pupil, and found that counties with high "wealth" in terms of assessed valuation can raise equivalent sums of money only by apportioning a relatively greater share of income to taxes. *Id.* at 222-223, citing Davies, *The Challenge of Change in School School Finance,* in NATIONAL EDUCATIONAL ASSOCIATION, 10TH ANNUAL CONFERENCE ON SCHOOL FINANCE 199 (1967).

Since in the same sentence in which the District Court purported to find a correlation between family income and district assessed valuation it also announced an inverse relation between district "wealth" and percentage of minority pupils, it will be convenient to dispose of that point here. The court did not rely at all on racial considerations in its determination of unconstitutionality and it was wise not to do so. The determination of a racial correlation again rested on

Table VII of Plaintiffs' Exhibit VIII, which we have reproduced above.[1]

> Again, however, the validity of this conclusion based on the study's figures is doubtful. The "correlation" only exists for the 10 richest and 4 poorest districts. This pattern disappears in the middle groups which include 96 of the 110 districts. Whatever correlation there is between the percentage of minority people and the tax base wealth of a school district in Texas may reflect the rural nature of Texas minority life or some other state peculiarity.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 525 n. 71 (1972).

Professor Coons and his associates speak forcefully to this point:

> Finally, an easy association of poverty with black people is the incessant theme of public utterance. It is not surprising that even the present litigation is understood by many of its close supporters as a racial struggle.
>
> The fact is otherwise. There is no reason to suppose that the system of district-based school finance embodies racial bias. * * * No doubt there are poor districts which are basically Negro, but it is clear almost by definition that the vast preponderance of such districts is white.

PRIVATE WEALTH 356-357. They present also figures from an unpublished study by the California State Department of Education showing that in that district 59% of minority students live in districts that are above the median assessed valuation per pupil. *Id.* at 357 n. 47.

In order to reverse the judgment below it is not necessary for this Court affirmatively to reject the un-

[1] P. 21 above.

sound factual assumptions that "quality is money" or that assessed valuation per pupil is an adequate measure of a district's ability to pay or of the income of its residents. It is enough that these assumptions are not demonstrably true and that they remain fighting matters among those concerned about these things. In connection with whether obscenity has a harmful effect, the Court has noted that there is a growing consensus that while a casual link has not been demonstrated it has not been disproved either. In that situation, the Court said, legislation that proceeds on the premise that obscenity is harmful has a rational basis. *Ginsberg* v. *New York,* 390 U.S. 629, 641-643 (1968). Given the limitations of knowledge on these difficult questions of school finance, the Constitution does not require that the states be bound by assumptions that cannot be proven.

4. The Flaws in the Legal Argument

The legal argument in support of Proposition I is in a great American tradition. From the earliest days there has been pressure on this Court—to which it has sometimes succumbed—to find in the Constitution a mandate for the majority of the Court to substitute their judgment of wise policy for that of legislative bodies.

In the great leading case of *Fletcher* v. *Peck,* 6 Cranch (10 U.S.) 87 (1810), Chief Justice Marshall asked "whether the nature of society and of government does not prescribe some limits to the legislative power * * *." *Id.* at 135. His decision ultimately rested in the alternative on the Contract Clause or on "general principles which are common to our free institutions * * *." *Id.* at 139. Justice Johnson based his concurring vote "on the reason and nature of things: a

principle which will impose laws even on the deity." *Id.* at 143.

As the bar developed more experience with constitutional argument, it found that contentions of this kind could be fitted readily enough within the generalities of specific clauses of the Constitution.

In Marshall's day the Contract Clause served this purpose. As it came to be cut back in scope during the years of Chief Justice Taney, arguments based on the negative aspect of the Commerce Clause came to the fore. The post-Civil War amendments gave new scope for imaginative counsel. Although John Archibald Campbell's audacious attempt to turn the Privileges and Immunities Clause into a general supervisory power over state legislation—and particularly legislation produced by Reconstruction legislatures—received its just deserts in the *Slaughterhouse Cases,* 16 Wall. (83 U.S.) 36 (1873), the essence of his argument ultimately was written into law, attached to the Due Process Clause.[1] It had been supposed that that unhappy episode in constitutional law had been buried in 1937, but there will always be those who chafe at the slowness of the legislative process and who hunt for a shortcut by which society can be changed by constitutional construction.

Today the favorite vehicle for efforts of this kind is the recently-developed doctrine that if a "suspect" classification affects "fundamental" rights, a "compelling state interest" is required to justify the legislation. It is not coincidence that Professor Coons and his collaborators, who think "[l]ittle is to be expected

[1]The most fascinating account of this development, and one of the masterpieces of legal essays, is Hamilton, *The Path of Due Process of Law,* in THE CONSTITUTION RECONSIDERED 167 (Conyers ed. rev. 1968).

from the political process in its legislative mode," PRIVATE WEALTH xx, dedicate their book "To nine old friends of the children." *Id.* at v. These authors are charmingly candid about the new constitutional requirement they have discovered:

> Concededly, Proposition I is no logical extension of any existing doctrine, and the argument for it will rely more upon policy than syllogisms.

Id. at 396. For such an argument the new Equal Protection doctrine is well suited since, as a distinguished commentator sympathetic to the doctrine admits, determinations of "the relative invidiousness of the particular differentiation" and "the relative importance of the subject with respect to which equality is sought" are "largely subjective judgments." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 95 (1966). To the extent that that is true, it provides an easy way to bridge the gap from statistical comparisons of the Edgewood School District with the Alamo Heights School District to the conclusion that the Texas system of school finance is unconstitutional.

The reasoning of the court below, echoing what the reformers have written in the literature is that

> [m]ore than mere rationality is required, however, to maintain a state classification which affects a "fundamental interest", or which is based upon wealth. Here both factors are involved.

(337 F.Supp. at 282, App. 259).[1] In fact neither factor is involved.

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[1]If the use of the alternative "or" in the first sentence suggests that one of these factors standing alone would be enough, it is in error. "The invariable formulation of the doctrine as applied to wealth classification requires both wealth classification and impairment of a fundamental interest in some varying combination." Goldstein, *Interdistrict Inequali-*

We fully agree with the statement by the District Court about "the very great significance of education to the individual" (337 F.Supp. at 283, App. 259). But that does not mean that it is "fundamental" in the sense that makes applicable the "compelling state interest" or "rigid scrutiny" test. The cases on this point have been so clearly analyzed by Judge Alexander Harvey, II, of the District Court in Maryland, that we quote his discussion:

> Clearly, the stricter test is applied where the right to vote has been at issue. *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965). Similarly, where a case has involved the right of a defendant in a criminal case to receive a fair trial, such right has been treated as a fundamental interest subject to strict scrutiny. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963). More recently, the right to travel, recognized as a basic right under the Constitution, has been included in this list. *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969). Classifications because of race have been treated as suspect at least since *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Unique historical considerations have been recognized as requiring the stricter test for racial classifications inasmuch as the equal protection clause was a product of the desire to eradicate legal distinctions founded on race. *Shapiro* v. *Thompson, supra*, at 659 (Harlan J., dissenting) *Dandridge* v. *Williams*, [397 U.S. 471, 489 (1970)] (Harlan J., concurring). Classifications based on alienage are likewise suspect. *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944).
>
> These and similar opinions suggest the following (1) that those interests heretofore labeled funda-

ties in School Financing: A Critical Analysis of Serrano v. Priest *and Its Progeny*, 120 U.PA.L.REV. 504, 511 n 22 (1972); Note, 23 HAST.L.J. 365, 389-391 (1972).

mental are few and are rooted in some provisions of the Constitution, and (2) that no decision of the Supreme Court has held that education is a fundamental interest of the type requiring the application of the more rigid test to legislative classifications dealing with the subject. In *Brown* v. *Board of Education, supra,* the Supreme Court did state that education is "perhaps" the most important function of state and local governments. (347 U.S. at 483). However, this statement was made in connection with the Court's assessment of the effects of racial segregation on children during their formative years in school. The strict scrutiny test was applied in *Brown* not because education is a fundamental interest but because classification by race is clearly suspect. * * *

That education is important and a vital concern of state and local government cannot be denied. But this is far from saying that education is so vital as to be called a "fundamental" interest from a constitutional point of view and thus made subject to a much more rigorous constitutional test than that applied in other areas of state concern. Can it reasonably be said that education is a more fundamental interest than health or welfare? Millions of young people in the United States are, of course, immediately and vitally affected by educational policies and expenditures. Millions of the aged on the other hand are more immediately and vitally affected by state expenditures for health care. Public welfare, which provides "the most basic economic needs of impoverished human beings" (*Dandridge* v. *Williams,* supra, at 485), undoubtedly would be viewed by large numbers of underprivileged and disabled citizens as a matter of more fundamental and immediate concern than either health or education. This Court concludes that when state statutory programs dealing with education, health or welfare as to be examined under the equal protection clause, there is no essential difference in any of these three vital areas of state concern.

* * *

> To hold that the strict scrutiny test applies to legislation of this sort would be to render automatically suspect every statutory classification made by state legislatures in dealing with matters which today occupy a substantial portion of their time and attention. If the test which plaintiffs seek to apply is the appropriate standard here, then a state, on each occasion that a similar Fourteenth Amendment attack were made against a statute dealing with health, education or welfare, would be required to bear the burden of proving the existence of a compelling state interest. This Court cannot conclude that state legislatures are to be strait-jacketed by such recently evolved constitutional theory in areas that have traditionally been the exclusive concern of the state.

Parker v. *Mandel,* Civ. No. 71-1089-H (D.Md., June 14, 1972). For other analyses rejecting the notion that education is "fundamental" in the sense in which that term is here used, see Brest, *Book Review,* 23 STAN.L. REV. 591, 604-608 (1971); Note, 23 HAST.L.J. 365, 391-396 (1972).

Nor is the argument for Proposition I strengthened by reliance on such cases as *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966), *Bullock* v. *Carter,* 405 U.S. 134 (1972), *Griffin* v. *Illinois,* 351 U.S. 12 (1956), and *Douglas* v. *California,* 372 U.S. 353 (1963), for the proposition that wealth is a "suspect classification." The concern of those cases seems to be not with wealth—or, more accurately, ability to pay, Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land,* 1 J. LAW & EDUC. 73, 89 (1972)—but with the interests in fair criminal procedure and in voting that were at stake. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,*

83 HARV.L.REV. 7, 25 (1969). They deal with individual ability to pay, not with the ability to pay of a collectivity, such as a school district. They teach that there are certain rights—voting, a lawyer, a transcript—that cannot be denied entirely. An indigent person in the Edgewood area of San Antonio has a constitutional right to be provided with counsel if he is charged with a crime but the Constitution does not require the state to provide him with a lawyer of the same distinction as the man in Alamo Heights will retain if he runs afoul of the law. The proponents are right to concede that "however they may be interpreted, the poverty cases by themselves are insufficient as a base for our position." PRIVATE WEALTH 375.

In its eagerness to write Proposition I into the Fourteenth Amendment, the District Court did not see fit to discuss recent decisions of this Court, then available to the court below, that are contrary to the legal position it took. Such cases as *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *James* v. *Valtierra,* 402 U.S. 137 (1971), and *Gordon* v. *Lance,* 403 U.S. 1 (1971), were not given so much as a passing mention. To these may now be added decisions of this Court that have come down since the decision below, such as *Lindsey* v. *Normet,* 405 U.S. 56 (1972), *Wisconsin* v. *Yoder,* 92 S.Ct. 1526 (1972), and *Jefferson* v. *Hackney,* 92 S.Ct. 1724 (1972).

Perhaps the most important of these, in terms of its implications for the present case is *Dandridge.* There the Court upheld a state regulation that put an absolute limit on welfare payments for dependent children regardless of the size of the family or its actual need. The Court stated that the era in which it struck down state laws because they might be unwise, improvident, or out of harmony with a particular school of thought

had "long ago passed into history." 397 U.S. at 485. It stated the classic constitutional doctrine:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. * * *
>
> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. * * * And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

397 U.S. at 485-486.

A portion of that passage from *Dandridge* was quoted recently by the Court in *Jefferson,* another welfare case. In *Jefferson* the Court then added the following comment:

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

92 S.Ct. at 1731.

The welfare cases were far more likely candidates than the present case for the "rigid scrutiny" test. They involved real dollars for real individuals, not the statistical abstractions that are the substance of the

present case. They were concerned with "the most basic economic needs of impoverished human beings," while education, vitally important as it is, is an interest that on occasion must yield to other things, as *Wisconsin* v. *Yoder* has recently taught. If Maryland can say to a hungry family that $250 per month is enough for it to live on, no matter how many children there are or what the circumstances of the family may be, why is it unconstitutional for Texas to determine that the amount spent per pupil in the Edgewood School District is enough to provide an adequate education?

The need of the poor for housing was involved in *Lindsey* v. *Normet*. There the argument was made that a more stringent test of equal protection should be applied because "the need for decent shelter" and the "right to retain peaceful possession of one's home" are "fundamental interests which are particularly important to the poor" and cannot be infringed except on the basis of a compelling state justification. 405 U.S. at 73. This Court thought otherwise, and applied the orthodox "rational basis" test to uphold the statute. It said:

> We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. * * * Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function.

405 U.S. at 74.

James v. *Valtierra* and *Gordon* v. *Lance* evidence the value that the Constitution, and this Court, place on local self-determination even when so "fundamental" a right as education or so "suspect" a classification as poverty are implicated. The state constitutional

provision requiring approval by referendum for low-rent housing projects in *James* referred in terms to "persons of low income." It was a *de jure* classification in terms of wealth, rather than a *de facto* classification in terms of ability to pay, which is the most that is even arguably involved here. The Court was not persuaded by the argument of the dissenters that this was "an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny * * *." 402 U.S. at 144-145. It distinguished *Hunter* v. *Erickson,* 393 U.S. 385 (1969), since that involved a racial classification and on that ground was "constitutionally suspect." 402 U.S. at 140-141. It upheld the state provision.

> This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constituional command that no State shall deny to any person "the equal protection of the laws."

402 U.S. at 143.

The challenge in *Gordon* was to a requirement that 60% of the voters must approve the issuance of bonds. The bonds in question were for building schools and thus involved the supposedly "fundamental" right to an education. But neither that fact nor the fact that the requirement gave disproportionate power to a minority of voters was enough to run afoul of the Equal Protection Clause.

> That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness

limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.

403 U.S. at 6-7. Texas has chosen a system that gives to the people of each community "a voice in decisions that will affect the future development of their own community" and their own children. It may not be a wise or desirable system, but that balancing of interests is for the state to resolve.

The court below thought that the choice Texas gives to school districts was illusory since "poor" districts in reality have no choice. Even though they tax themselves heavily they cannot raise much money (337 F.Supp. at 284, App. 259). But this is not like *Hargrave* v. *Kirk,* 313 F.Supp. 944 (N.D.Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education. Here the state has assured every child in every school district an adequate education. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much. In fact, every district in the state does go beyond the minimum foundation program (App. 57). Thus the people of each district do in fact have a choice and have exercised it.

The real objection of the plaintiffs is not that they have no choice but that the choice is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate[1] and will provide their children with a more expensive education. The foundation program in Texas, like that in a majority of the states, puts a floor under educational spending but imposes no

[1]Though quite possibly as a higher percentage of income. See pp. 22-24 above.

ceiling on it. Plans of this kind are the outgrowth of the pioneering work of Strayer and Haig in 1923. STRAYER & HAIG, FINANCING OF EDUCATION IN THE STATE OF NEW YORK (1923). They guarantee an equal right to an education even if not a right to an equal education. They do "not preclude any particular community from offering at its own expense a particularly rich and costly educational program" so long as there is "an adequate minimum offering everywhere." *Id.* at 173.

Ten years after the birth of the foundation plan a national group of educators issued a "School Finance Charter," which has been "frequently cited * * * as the authoritative expression of professional education on the issue of equality of opportunity." PRIVATE WEALTH 474. Its third plank was: "For every school district the right to offer its children an education superior to state minimum standards and to seek and develop new methods intended to improve the work of the schools." REPORT OF THE NATIONAL CONFERENCE ON THE FINANCING OF EDUCATION 10 (1933), quoted in PRIVATE WEALTH 474-475. A few years later the League of Women Voters called for equality of educational opportunity, but said: "Equalization leaves room for local initiative where the community raises more than the minimum amount." NATIONAL LEAGUE OF WOMEN VOTERS, SCHOOL FINANCE AND SCHOOL DISTRICTS 27 (1936), quoted in PRIVATE WEALTH 476-477. As recently as 1965 reputable writers asserted that in educational finance "equalization" does not mean the same level of expenditure in all school systems but merely "reduc[ing] the difference by raising the level of support in areas of low wealth." HARRISON & MCLOONE, PROFILES IN SCHOOL SUPPORT 85 (1965).

This feeling persists. Mention was made earlier of the fact that Hawaii is frequently cited as the only

state in which school finance is handled on a state-wide basis and in which Proposition I is apparently satisfied. Yet in 1968 Hawaii amended its law to permit its counties to use their own funds to supplement state funds for construction of schools, maintenance of facilities, and transportation of children. Section 1 of the statutes, stating the reasons for its enactment, is of interest:

> Prior to Act 97, Session Laws of Hawaii 1955, each county in the State was responsible for the construction of school improvements, maintenance of public school facilities and grounds and the transportation of school children within the county. Act 97 stripped the counties of the responsibility involving this whole area.
>
> Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government.

Act 38, § 1, Haw. Sess. Laws (1968).

The Texas plan is not the result of mere happenstance. It is not the product of invidious discriminations. It is the result of repeated studies within the state.[1] It is consistent with what most states have chosen to do and with what most educators for the last half century have thought is the most enlightened approach to the problem. Even one of the advocates of the new enlightenment recognizes the rationality of systems like that in Texas.

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[1]See pp. 10-11 above.

> After examining the educational and financial programs within a state, the Court might well conclude that substantial equality does exist. The Court might note that all school districts make available twelve years of schooling and, by this standard, conclude that there is substantial equality. Or the Court might note that all the school children of the state are supported at a specified minimum and conclude that this constitutes substantial equality. These possibilities are very real, and comport with traditional understandings of the term "equality of educational opportunity."

WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 191 (1967).

It has never been supposed prior to now that it is unconstitutional to allow local governmental entities to spend their funds locally. "The use of taxes in the county where the taxed property is located does not, of itself, constitute an invidious discrimination or unreasonable classification." *Board of Education of Independent School District No. 20 Muskogee, Okla.* v. *Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969). "* * * [W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *McGowan* v. *Maryland,* 366 U.S. 420, 427 (1961). See also *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 231 (1964); *Salsburg* v. *Maryland,* 346 U.S. 545, 552 (1954).

The special circumstances that bring into play the "compelling state interest" test are not present here. The applicable standard is the "rational basis" test. It would be doctrinaire in the extreme to hold that there is no rational basis for continuing a system that has worked well and been widely hailed for 50 years in preference to immediate adoption of some new scheme,

on which the reformers themselves cannot agree, based on a premise that has only been conceived in the last few years.

5. Practical Consequences of the Decision Below

Under Points 3 and 4 we have shown that the decision below resulted from applying to unsound factual assumptions a view of the Equal Protection Clause that is contrary to that announced in recent and authoritative decisions of this Court. That is all that we need demonstrate to obtain reversal. Whether school finance systems ordered in accordance with Proposition I would be better or worse than those currently employed is not for this Court to decide. The only legitimate inquiry here is whether the District Court's adoption of Proposition I is required by the Constitution. "If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting). But in the interest of completeness we think it not inappropriate to take brief note of some of the consequences that would follow from affirmance of the decision below.

It is quite apparent that a state required to comply with a decree like that entered below would be compelled either to increase by a vast amount the money it spends on education, in order to bring every other district even in dollars per student with the richest district, or to redistribute the funds now spent on education so that all of the districts would be even. Few, if any, states could afford to follow the former course. The Andrews School District in Texas spent $1,708 per student in 1970-71 and was at the 99.9% level in this regard among all Texas districts. To raise spending in

every district in Texas to the level in Andrews would add more than $2.4 billion to the total cost—and it still would not have reached 36 districts that spend even more. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 17 (1972). All state governments today are hard pressed financially. It is very unlikely that the state could produce a sum of that magnitude, more than double the total amount currently spent in Texas on public education, to satisfy the mandate of the District Court. If the state could produce that kind of money, it is highly doubtful that it would be wise public policy to commit to education at a time when society has many other urgent needs and inadequate funds to meet them. This is especially true in view of the absence of proof that these increased expenditures would increase the quality of the education provided.[1] A response of this kind would be bad news for the taxpayers, mean no change for the school children, and be a cause of jubilation for school teachers. Professor Moynihan, who thinks that decisions of this kind will result in a rise in educational expenditures, observes that "the only certain result" of this will be "that a particular cadre of middle-class persons in the possession of certain licenses—that is to say teachers—will receive more public money in the future than they do now." Moynihan, *Can Courts and Money Do It?*, N.Y. Times, Jan. 10, 1972, § E, at 24, col. 1.

The other alternative, taking money away from some districts in order to bring every district to the present average, is more likely but hardly more promising. To equalize at the average level throughout the state would require $131.5 million to be taken away from 622 districts and given to 527 other districts. TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 15 (1972). We leave it to others to say how the newly-

[1] See pp. 18-20 above.

affluent districts would find ways to spend their money, how the districts from which the money is taken would adjust, what would happen to the tenure of teachers for whom there would no longer be jobs in the community in which they reside, how districts that have issued large amounts of bonds in reliance on their revenues under the present system of finance would pay off those bonds, and other such practical details.

Some of the huzzahs that have greeted the opinion below and the other lower court decisions that preceded it have been from those who are concerned about the problems of city schools and who have seen in Proposition I a device that will funnel vast new sums into those schools. This is almost certainly an illusion. In a sample of 223 school districts in eight states the National Education Finance Project found that in 1967 major urban core cities had higher market value of property per pupil than any other type of school district. JOHNS ET AL., ALTERNATIVE PROGRAMS OF FINANCING EDUCATION 91 (1971). Similar results have been reported in the press from a massive and sophisticated examination by the Urban Institute of the way that school financing actually works. It has reported on 1968-69 experience in California.

> The Urban Institute compared the resources of five types of community—rapidly growing suburbs, stable suburbs, central cities, small cities, and rural districts. The rapidly-growing suburbs had the lowest tax base per child, $37,138, compared with $53,222 in the slow-growth suburbs and $56,428 in the central cities. Teachers in the rapidly growing suburbs generally had less experience than those in the other types of district, and a lower proportion of those teachers had advanced degrees. Experience levels were highest, on the average, in the central cities and the stable suburbs.

> Advanced training was most common among big city teachers.

Anderson, *Financing Schools: Search for Reform*, Washington Post, May 31, 1972, at A16, col. 5.

Professor Joel Berke was the principal expert witness for the plaintiffs in the present case. He is also a consultant for the Senate Select Committee on Equal Educational Opportunity. In the latter capacity he has published a monograph in which he says:

> Despite the widespread enthusiasm that the California, Minnesota, and Texas cases have raised throughout the Nation, it is our belief that finance reform of the type just described will not result in removing the major inequities in American educational finance and on the contrary may well exacerbate the problems of a substantial proportion of urban schools.

SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, UNITED STATES SENATE, 92D CONG., 2D SESS., THE FINANCIAL ASPECTS OF EQUALITY OF EDUCATIONAL OPPORTUNITY AND INEQUITIES IN SCHOOL FINANCE 66 (Comm. Print 1972).

As we pointed out in the preceding section, the argument of plaintiffs and those who agree with them is not they are denied an adequate education but that others more fortunately situated get a more expensive education. We pointed out there that that situation, far from being irrational, is in accord with the best educational thinking from 1923 on, that the state should provide funds to set a floor but that local communities should be free to spend more than that amount.[1] It is not only educators who think that this is the wisest system. Editorials in newspapers not usually thought of as unduly conservative have recently expressed a similar view.

[1] Pp. 36-37 above.

The New York Times, praising the decision of the California Supreme Court along these lines, concluded that there should be centralized state financing but "without discouraging additional investments by education minded communities in the betterment of their schools." N.Y. Times, Sept. 2, 1971, at 32, col. 1. The editorialists for the Washington Post want all schools brought up to a strong national standard, but say: "If some districts have the resources and dedication to exceed that standard, they are entitled to reach higher." Washington Post, May 31, 1972, at A16, col. 2.

Professor Coons and his associates offer a way in which this can be done, consistent with Proposition I, through "district power equalizing." The state, by taking funds from "richer" districts and giving them to "poorer" districts, would guarantee that a particular tax rate would provide a stated number of dollars per student, regardless of the tax base of the particular district. Thus each district would remain free to decide how much it would spend on education by setting its tax rate. This would preserve local freedom of choice—or, as these authors call it "subsidiarity,"—PRIVATE WEALTH 15. They are right in thinking that this element of local choice is of great importance. This "preference for low level decision-making has furnished the common coin of political discourse in America since 1789." *Id.* at 14. "* * * [P]ersons seeking better schools through centralized 'equality' often overlook the fact that the achievement of such an equality guarantees not better but only similar schools." *Id.* at 17. Subsidiarity in education is "a school for democracy." *Id.* at 18.

> Educational administration is not noticeably overpopulated with philosopher kings. Even if it were, education is too important to be left to profession-

als whose plenary control under a centralized system would be difficult to avoid.

Ibid.

> Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence.

Coons, Clune, and Sugarman, *A First Appraisal of Serrano,* 2 YALE REV. OF LAW & SOCIAL ACTION 111, 119 (1971).

With these, and all similar recognitions of the importance of local autonomy and freedom of choice, we agree. See, e.g., Freeman, *Should Local School Support Be Abolished?,* 38 Vital Speeches 465, 469 (1972); Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1399 (1971). A similar recognition seems to lie at the heart of *James* v. *Valtierra,* 402 U.S. 137 (1971). Both the majority and dissenting opinions in *Wright* v. *Emporia City Council,* 40 L.WK. 4806 (June 22, 1972), recognize that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society * * *," *id.* at 4812, and that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.* at 4815 (Burger, C. J., dissenting). To the extent that "district power equalizing" would permit local school districts to decide how much they will spend it makes Proposition I far more palatable, though still hardly constitutionally compelled.

The difficulty is that Professor Coons and his associates seem to have persuaded no one except themselves that "district power equalizing" is either desirable or constitutional.

The recent Presidential Commission said of "district power equalizing" that "we do not find this a sat-

isfactory solution to the problem of disparities for a number of reasons." PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE & MONEY 33 (1972). Those reasons have been amply developed in the literature. The Coons plan does not in fact provide equality without sacrificing freedom. Districts with relatively low property values would be under great pressure to tax themselves at a high rate in order to receive the maximum state aid. Communities that wish to emphasize services other than education, and that have property values lower than the state average, would be inhibited from doing so, since tax for education would produce a grant from the state while a tax for a park or a library would not. Bateman & Brown, *Some Reflections on* Serrano *v.* Priest 49 J. URBAN L. 701, 706-708 (1972). The same tax rate for schools may in fact be a heavier burden in an urban district, where other taxes are high in order to pay for other needed services, than in another district where those services are not required. Brest, *Book Review,* 23 STAN.L.REV. 591, 594-596 (1971). Because of the marginal utility of the dollar, it requires less effort for a person who is rich, either in terms of income or of capital, to pay a tax of a given rate than it does for a poor person to pay a tax of the same rate. Indeed there was specific testimony to that effect by Professor Berke in the present case. (App. 193). Not everyone will accept the debonair suggestion that this is a point on which "principle must yield to pragmatism * * *." PRIVATE WEALTH 222.

Indeed several writers have argued that "district power equalizing" departs so far from the principle of "fiscal neutrality" or "equal educational opportunity" that it would itself violate the Equal Protection Clause. "If it is children who are entitled to equal protection, then it is difficult to understand how the quality of a child's education could be subjected to a vote of his

neighbors." Wise, *School Finance Equalization Lawsuits: A Model Legislative Response,* 2 YALE REV. OF LAW & SOCIAL ACTION 123, 125 (1971). See also Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief under the Equal Protection Clause,* 1970 WIS.L.REV. 7, 29-30; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV.L.REV. 7, 50-56, (1969).

Thus a state that adopted "district power equalizing" as a response to a decree of the sort entered below would at best be buying future litigation. It is those who think Proposition I is constitutionally compelled who should say whether power equalizing is consistent with that principle, or with the Constitution, but it is difficult to see why the same arguments that are made against present financing plans cannot also be made against a plan based on power equalizing.

The alternative, centralized decisions on a statewide basis about spending levels, would destroy local autonomy, with all the values this brings to the system. It would discourage experimentation and promote uniform mediocrity. It would be a crippling blow to education at a time when it is already under heavy pressure from those who resist desegregation. As the author of the Coleman Report has said:

> Any technique to create equality of financial resources for education in the presence of family income inequalities must have some means by which those with higher income can aid their child's education, or else they will use that income to do so outside the system of public education.

Coleman, *Foreword,* in PRIVATE WEALTH xiii. So long as *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), remains authoritative, a ready alternative is at hand for those with comfortable means. The decision below

would encourage flight away from the public schools at a time when those schools are the principal hope of achieving a society that is not divided by artificial barriers of race or class or wealth.[1]

Conclusion

Twice before this Court has summarily affirmed decisions of district courts that had rejected challenges to the system of public school financing similar to the challenge that has been made in the present case. *McInnis* v. *Ogilvie,* 394 U.S. 322 (1969); *Burruss* v. *Wilkerson,* 397 U.S. 44 (1970). Because of the interest that has subsequently arisen in this subject, and decisions, such as the decision below, that have refused to follow *McInnis* and *Burruss,* the Court was wise to hear full argument in this case, in order that the Court's view of the matter may be made unmistakably clear to the profession after plenary consideration. The result, however, should be the same.

What the Court said in *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970), and reiterated in *Jefferson* v. *Hackney,* 92 St.Ct. 1724, 1734 (1972), states the approach that should be decisive of the present case:

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[1]In the same year in which Hawaii, which had been the only state to have complete centralized financing of its schools, amended its statutes to restore some measure of local control, see note 1 p. 5 above. Its Supreme Court described the state of its public schools:

> The gap in the quality of education provided by public schools and the quality of education provided by private schools is still reflected today in the ratings given to the various high schools in the State by the Accrediting Commission for Secondary Schools of the Western Association of High Schools and Colleges. About 44 per cent of the nonpublic high schools received the highest rating possible while none of the public high schools received such a rating.

Spears v. *Honda,* 51 Haw. 1, 7 n. 5, 449 P.2d 130, 135 n. 5 (1968).

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

For all of the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of July, 1972, I served three copies of the foregoing Brief for Appellants, together with three copies of the Appendix in this cause, upon the Appellees by depositing same in the United States Mail, postage prepaid, and addressed to Appellees' attorneys of record as follows: Mr. Arthur Gochman, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, and Mr. Mario Obledo, 145 9th Street, San Francisco, California 94103.

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FILED
JUL 21 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF BY BOND COUNSEL AS *Amici Curiae* RELATING TO THE PROPERTY TAX SECURITY FOR SCHOOL DISTRICT BONDS AND NOTES

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BRIEF OF AMICI CURIAE RELATING TO THE PROPERTY TAX SECURITY FOR SCHOOL DISTRICT BONDS AND NOTES

IDENTIFICATION AND PURPOSE OF AMICI CURIAE

Amici curiae are among those lawyers and law firms specializing as "bond counsel" in the drafting of state laws, the preparation of proceedings, and the rendition of approving opinions relating to state and local government debt financing through the issuance of bonds, notes and other instruments of obligation. Such debt financing includes obligations issued by public school districts for capital improvements and other needs. By long-established custom and practice, intended to protect both bond issuers and bond purchasers, approving opinions of bond counsel regarding the validity and enforceability of bonds are required in the public bond market to assure accept-

ance of such bonds by underwriters and investors. Because of their special experience and knowledge in state and local government debt financing, the undersigned present their views to this Court as *amici curiae* on a very narrow aspect of the instant case which is within their special competence. This Brief is filed pursuant to consent of all parties under Rule 42(2) of the Revised Rules of the Supreme Court.

This Brief does not take a position on the merits of the constitutional question presented. Rather, the purposes of this Brief are to focus attention on bond and note financing of school districts in those states operating under systems similar to that employed in Texas[1]; to emphasize that a decision by this Court affirming the decision of the District Court need not and should not affect the ability of local school districts to continue their financing programs pending any restructuring of the systems of school finance by the state legislatures if such a restructuring is required by this Court's decision; to emphasize further that such a decision need not and should not call into question the local property tax as a source of security for outstanding bonds and notes; and, particularly, to support that portion of the "Clarification of Original Opinion" of the District Court in the instant case, *Rodriguez* v. *San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971), (quoted at page 7 herein) by which that Court made it clear that bonds and notes could continue to be issued for at least a period of two years by school districts under existing laws and that the

[1]Only the State of Hawaii does not provide for the levy of property taxes by local school districts. The system of finance in that state is centralized. See Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financing Structures*, 57 CALIF. L. REV. 305, at 312 n. 18 (1969); Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?* 1 JOURNAL OF LAW AND EDUCATION 73, at 73 n. 1 (1972). See also Section II herein.

property tax security and source of payment thereof, and for other contractual obligations, was not to be impaired by the implementation of the District Court's order.[2]

Thus, and with complete awareness that the holders of school bonds and notes (hereinafter referred to as "bondholders") and the issuing school districts have a very clear and actual unity of purpose, the objectives of *amici curiae* herein are two-fold—to protect the contractual rights and security of holders of school bonds and notes for the timely payment of principal and interest due on their investments and for the timely funding of notes issued in anticipation of bonds; and to preserve the ability of school districts to continue debt financing for critically-needed capital improvements and other needs under existing laws until and unless a new system of finance is established if any such restructuring should be required by this Court's decision.

While the subject of this Brief would not be a matter for concern unless the decision of the District Court in the instant case were affirmed, the undersigned do not in any way mean to presume that such will be the decision of this Court. Further, the undersigned do not imply that a decision on the merits regarding the constitutional question presented in the instant case could or would affect the outstanding bonds, notes or contractual obligations of school districts or the legal capacity of such school

[2]It will be noted that under Section III of this Brief, analysis of the "fiscal neutrality" concept leads to the conclusion that such concept does not require a state legislature at any time to abandon local property taxes as security for indebtedness, and the decision in the District Court herein is not viewed as being inconsistent with that conclusion since the Court did not purport to state that the debt issuing structure needs to be altered. It should also be noted that many of the considerations discussed in this Brief apply also to contractual obligations (other than bonds and notes) incurred for school purposes prior to an applicable court order and during any permitted transition. The Clarification in the case at bar protects such obligations as well as bonds and notes.

districts to issue bonds or notes or to incur contractual obligations pending any restructuring of the systems of school finance by the state legislatures either as the result of judicial directive or voluntary action.[3] Rather, the objective of this Brief is to emphasize such aspect to assure full cognizance of it and thereby seek to avoid confusion and the unnecessary and unfortunate consequences of confusion. This aspect is more thoroughly discussed in the next section of this Brief.

DISCUSSION

I

The Nature of the Practical Problem and Suggested Solution

The decision, upon motion to dismiss the action, in *Serrano* v. *Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), soon followed by the denial of defendant's motion to dismiss in *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (D. Minn. 1971), unfortunately and incorrectly caused major concern throughout the country that litigation of that nature might result in decisions whereunder local property taxes pledged to the payment of school district bonds and notes would be withdrawn as security for even those bonds and notes issued prior to final disposition of such litigation. This concern was typified by the observation that, as a result of those cases, "the school bond market on Wall Street, which last year involved over $3.5-billion in tax-exempt bonds, is currently facing an uncertainty that is slowing or halting bidding in some instances and postponing several scheduled offerings."[4]

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[3]In support of this proposition, see text of the Clarification of Original Opinion rendered by the District Court in the instant case, 337 F. Supp. 280, 286, as set forth on page 7 of this Brief.

[4]Cray, New York Times, Nov. 10, 1971, p. 67.

Similarly, Paul Heffernan, Editor of The Daily Bond Buyer, an authoritative financial journal of national circulation, commented:

> "A consequence is growing unwillingness of investors to buy such bonds and for banks and bond houses to risk their capital underwriting them.
>
> "The word is already going around Wall Street that there will be less widespread competitive bidding for school bonds in the future and fewer investing institutions willing to buy such bonds except after circumspect scrutiny. *The consequence of this would be higher borrowing costs for local government.*
>
> "The big banks are especially sensitive to the issue because of the nature of the business, with its constant exposure to all tiers of community life. For public relations reasons, the deposit institutions are more disposed than other market professionals to walk away from school financing of the disputed kind. The erosion of this underpinning of the underwriting market is already being felt as the big banks become more and more selective in committing their capital." Heffernan, *The Editor's Corner*, The Daily Bond Buyer, Nov. 15, 1971, p. 1 (Emphasis added).

As a result of fears of this nature, school district bonds and notes sought to be sold in the aftermath of *Serrano* generally sold at a higher rate of interest than comparable municipal securities, thereby producing substantially increased and irretrievable costs to local school districts and their taxpayers in the financing of needed capital improvements.[5]

---

[5]There is little question that confusion and uncertainty in the public bond market adversely affects the rate of interest which bonds and notes subject to such concerns will bear. Even if school district bonds and notes sold at a rate of interest only one-tenth of one percent higher than comparable municipal securities, such an apparently small fractional "spread" would produce a significant interest cost differential over the life of such bonds and notes.

These concerns and negative effects, while falsely premised, appeared to be justified, however, by the District Court's initial opinion, on December 23, 1971, in the instant case. The District Court seemingly held that the local school authorities and current purchasers of school bonds would not be able to rely for more than two years on Article 7, Section 3 of the Texas Constitution and certain provisions of the Texas Education Code under which ad valorem property taxes were levied and collected by local school districts for debt service as well as for operating and maintenance expenses. As a consequence, the Attorney General of Texas and Texas bond counsel immediately ceased giving approving opinions on bond and note issues of Texas school districts, and scheduled bond sales were cancelled.[6] This critical problem was promptly brought to the District Court's attention by the Attorney General in the form of a motion for clarification of judgment.

Assuming a $10,000,000 bond issue with level principal payments, maturing over a period of twenty years, with the first principal payment due one and one-half years after the date of such bonds, the interest cost differential resulting from a one-tenth of one percent spread would be $110,000. This same computation applied to the $3.9-billion of school bonds issued between July 1, 1970 and June 30, 1971 (see footnote 9, *infra*) would result in an increased interest cost of $45,922,500.

With respect to the fractional spread caused by confusion and uncertainty surrounding school district bonds and notes, it was reported in The Denver Post, January 24, 1972, p. 22 that some school districts were paying "slightly more interest" as a result of the uncertainty generated by court decisions: "Investment bankers estimate some school districts in other parts of the country must pay up to one tenth of 1 per cent more to investors than they would have before the rulings, in order to overcome underwriters' reticence."

[6]See document 199 of the record on appeal at pages 7-10 of such document.

On January 26, 1972, the District Court clarified its original opinion in order, as it said, "to dispel all possible doubts as to what was intended, prevent disruptions in the operation of the public school system in Texas, and avoid further delay . . ." Most importantly, the "Clarification of Original Opinion" stated, in part:

> "Our holding that the plaintiffs have been denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of Article 7, §3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation Program, shall have prospective application only, and shall not become effective until after the expiration of two years from December 23, 1971. This order shall in no way affect the validity, incontestibility, obligation to pay, source of payment or enforceability of any presently outstanding bond, note or other security issued, or contractual obligation incurred by a school district in Texas for public school purposes, nor the validity or enforceability of any tax or other source of payment of any such bond, note, security or obligation; nor shall this judgment in any way affect the validity, incontestibility, obligation of payment, source of payment or enforceability of any bond, note or other security to be issued and delivered, or contractual obligation incurred by Texas school districts, for authorized purposes, during the period of two years from December 23, 1971, nor shall the validity or enforceability of any tax or other source of payment for any such bond, note or other security issued and delivered, or any contractual obligation incurred during such two year period be affected hereby; it being the intention of this Court that this judgment should be construed in such a way as to permit an orderly transition during said two year period from an unconstitutional to a constitutional system of school financing." 337 F. Supp. 280, 286.

Following the announcement of such Clarification, the regular program of debt financing by Texas school districts was resumed, but only after they had lost the benefit of a month of most favorable bond market conditions which have not again been equalled to date.[7]

More fortunately, the New Jersey Superior Court was fully aware of this problem of confusion when it decided *Robinson* v. *Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972). The Judgment therein, dated February 4, 1972, is set forth in Appendix A. In the carefully developed paragraph 7 of that Judgment, the Court ordered:

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[7]The bond indices as published in The Daily Bond Buyer provide a relevant summary of market conditions prior to, during, and after this month of cancelled or delayed sales:

Date	*20-Bond Index*	*11-Bond Index*
December 9, 1971	5.23%	5.01%
December 16, 1971	5.21%	4.99%
December 23, 1971*	5.13%	4.92%
December 30, 1971	5.02%	4.82%
January 6, 1972	5.03%	4.82%
January 13, 1972	4.99%	4.78%
January 20, 1972**	5.17%	4.97%
January 27, 1972	5.29%	5.09%
February 3, 1972	5.35%	5.14%

*The indices reported on the day of the original decision of the District Court in the instant case.

**Last indices reported before the Clarification of Original Opinion by the District Court.

The low reading for 1971 was recorded on October 21, 1971 (4.97 and 4.75), and during the month (December 23 to January 26) in which no Texas school bonds were sold, the market conditions on January 13 approached that yearly low. The indices have not since reached the low recorded on January 13, 1972.

"7. Notwithstanding any of the foregoing terms or provisions hereof, nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations (all herein called 'obligations') or the expenditure or other application of proceeds of any such taxes or obligations; and for so long as any of such obligations shall remain unpaid as to any principal or interest, nothing herein contained or done pursuant hereto shall be applied or construed to affect the validity or binding effect of such obligations, the creation or legal existence of the issuer thereof, or shall, in the event any of such obligations shall not be paid as to principal or interest when due, invalidate, modify or otherwise affect the meaning or legal effect of any laws or statutes of this State in effect at time of issuance of such obligations relating to the assessment, levy or collection hereafter and the application of property taxes to pay such principal or interest or judgments therefor or relating to the enforcement and payment of any such obligations or judgments and interest thereon; . . ."

Thus, in the cases decided after hearings on the merits, the courts have carefully protected the continuing local property tax security not only for outstanding bonds and notes, but also for bonds and notes to be issued after the decisions;[8] and this basic security is preserved for so long as such bonds or notes are to be outstanding, so that purchasers of such obligations may know with precision and with certainty what they are purchasing and be able to evaluate the relative quality and proper price of such issues. Such a "savings" approach by the courts helps assure that school districts can continue their bond and note

[8]See also the case of *Hollins* v. *Shofstall*, No. C-253652 (Super. Ct. Ariz., June 1, 1972, as supplemented on June 6, 1972) referred to in footnote 23, *infra*.

financing programs or carry them on without suffering inflated interest rates, at a cost to the taxpayers, to cover unknown risks. The significance of such assurances is readily apparent when it is noted that over $3.9-billions of school bonds were issued in a twelve-month period in 1970-1971 and that the aggregate capital requirements of all local school districts in the nation for 1975 have been estimated at $5.6-billion.[9]

Quite obviously, a state legislature's response to such court orders, or actions upon its own initiative, may be to alter the method of school debt financing for the future. But the necessary and sensible effect of the court orders referred to above is to permit continued debt financing on a known basis until any such legislative change takes place, so that the bonds and notes issued prior to such change will continue to have their original security throughout their lives, and only those issued after a legislative change will be on a new foundation, if that is what

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[9]According to the figures in the *U.S. Bureau of the Census, Governmental Finances in 1969-70* (Series GF-70, No. 5), at 28 (1971), the total principal amount of outstanding long term debt issued for public elementary and secondary school purposes was more than $31.5-billion as of June 30, 1970. In fiscal year 1970-1971, over $3.9-billion in principal amount of bonds for public school purposes were sold across the nation, of which $330 million were issued by the states, $240 million by counties, $400 million by municipalities, $2.35-billion by school districts, and $580 million by public school housing authorities. *U.S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-1971* (DHEW Publication No. (OE) (72-63), at 11-12 (1972)). The projection of capital requirements for 1975 was made by Dr. Elsie Walters, Director, State-Local Research, Tax Foundation, Inc., in an address given on May 4, 1972 entitled "Perspectives on State and Local Finance to 1980." Dr. Walters prepared the table set forth in Appendix B and distributed such Table to persons in attendance at the Tax Foundation Seminar held in Chicago, Illinois, on May 4-5, 1972 relating to the subject of "The Business Role in State-Local Finance," which Table shows total expenditures for local schools, expenditures for current operations and expenditures for capital outlay.

is called for or determined by the legislature. In the meantime, the legislature will have had the opportunity to construct in a careful and thorough manner a new form of security, if necessary or desirable, for subsequent bond and note issues, and the purchasers of those issues will know precisely what they are bargaining for when submitting their bids.

While clearly recognizing that the matter discussed herein would be rendered moot by a decision for the appellants, it is strongly urged that *if* the District Court's decision is affirmed, this Court take a position as to bonds and notes comparable to the protective orders adopted by the District Court in the instant case and by the New Jersey Superior Court in *Robinson*, so that necessary bond and note financing for the school districts across the nation will not be dislocated or placed in doubt pending the making of any changes necessitated by the decision.

Such protective orders, as the one issued by the District Court in the instant case, are premised not only upon valid and practical considerations, but also upon sound legal reasons which are further discussed in the following sections of this Brief.

II

School Bonds and Notes in Texas and Many Other States Have Been Issued and Are Issuable Solely or Primarily on the Security of Local Property Taxes

Under present law in Texas, and the existing laws in most states having a similar system of school finance, the salability of school bonds and notes is based on the fact that they are secured by ad valorem property taxes which are levied by local school districts, collected and deposited in the district's treasury, and applied by such districts to the payment of principal and interest on such obligations. Consequently, *amici curiae* believe that this property tax security must be preserved for the life of any bonds or

notes which have been or are to be issued prior to any change in the method of securing the payment of school district bonds and notes, for absent such preservation there would be no reliable or sound way to evaluate the quality of such bonds or notes at the time of sale and accordingly they would become unmarketable or marketable only at premium interest rates.

The nature of existing laws for school debt financing in Texas and many other states is briefly described below in order to place the discussion in context. The Texas Legislature is authorized by Article 7, Section 3 of the Texas Constitution to create school districts with the power to levy and collect ad valorem property taxes. The Texas Legislature has established local school districts and has authorized them to issue bonds for certain capital improvements (TEXAS EDUC. CODE § 20.01) provided the voters of the district first authorize the issuance of the bonds and the levy of property taxes pledged to the payment of principal and interest on such bonds (TEXAS EDUC. CODE § 20.04). The Attorney General of Texas must approve the validity of such bonds before they can be issued (TEXAS EDUC. CODE § 20.06). The *sole* security provided for payment of the bonds is the local property tax.

While there are variations among the states, in most other states the method of school debt financing is substantially the same as in Texas. In essence, school districts, or the governmental entities having control of local schools,[10] are permitted to issue bonds for capital improvements and to levy and collect special or general property

[10]In certain states, such as those in the New England area – particularly Connecticut, Maine, Massachusetts and Rhode Island – the schools are generally operated by cities and towns and these governmental entities have authority to levy local property taxes sufficient to meet debt service requirements of bonds issued by such entities where other revenue sources do not provide sufficient moneys for that purpose.

taxes within the district, to pay debt service thereon. Frequently, the questions of bond authorization and property tax authorization are submitted to the voters of the district for approval.[11] If the voters approve the issuance of bonds, school districts may then proceed with their issuance and in some states may issue notes for an interim period in anticipation of the issuance of such bonds. Further, and fundamental to the issuance of such obligations, a common requirement is that provision must be made for the levy of a property tax sufficient to meet debt service. Even where the bonds are deemed to be secured by the general revenue resources of the school district, the local property tax generally is regarded as the basis for evaluating the quality of the bonds. In addition to these forms of capital improvement financing, certain states also permit school districts to issue notes or other obligations in anticipation of current revenues or in anticipation of certain tax levies, and significantly, these obligations are also usually secured by local property taxes.

The principal points in the foregoing description of present school debt financing laws in most states are that the primary, and frequently the only, security as well as often the only source for payment of debt service presently provided for under such laws, is the ad valorem tax levied on property located within the district issuing

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[11]See *U.S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-71* (DHEW Publication No. (OE) (72-63) (1972)) where it was reported:

"State requirements differed concerning voter approval of school bond issues. Three States – Alabama, Hawaii, and Indiana – did not require voter approval. In 15 other states, voter approval was required of some but not of all school systems, depending on the classification or charter of the system. In the remaining 32 states, voter approval was required before any general obligation bonds could be issued for public school purposes. Of these 32 states, 13 required that the voters approve the bond issues by some specific figure in excess of 50 percent . . ." Pages 3-4.

tne bonds or notes, that the laws relating to the levy of taxes sufficient to meet debt service requirements are a part of the contract between the issuing school district and the bondholders,[12] and that such district is therefore obligated under such contract to levy taxes in sufficient amount to make timely payments during the life of such bonds or notes. Such school obligations are salable to the public because of the reliance placed upon this status of debt financing laws and upon the collectability and enforceability of such local property taxes.[13] Quite obviously, these present laws are the only authority under which school districts can continue their necessary debt financing programs, and all that bond purchasers can rely upon. Both school districts and bond purchasers must have the assurance that such laws will continue to be applicable to any debt securities which are issued prior to a change in school finance structures, whether undertaken by legislatures voluntarily or pursuant to court orders.

III

The Concept of "Fiscal Neutrality" Advanced by the District Court Does Not Preclude Continued Use of Local Property Taxes as Security for Debt Service on School Bonds and Notes

Without considering the merits of the equal protection conclusions expressed in *Serrano*, *Van Dusartz* and *Robinson* and by the District Court in the instant case, or endorsing those conclusions, it should be emphasized that those courts did *not* decide that equal protection guarantees require that local property taxes for school purposes

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[12]See *Von Hoffman* v. *Quincy*, 71 U.S. 535, 552, 554-55 (1886).

[13]Because this form of security has been the foundation of debt financing for school improvements for a substantial period of time and has been widely accepted and successful, it has provided a known measurement of quality and price in purchasing school bonds and notes and caused purchasers thereof to rely on the con-

must be abandoned. Rather, those courts took the position that existing systems of providing school funds which result in substantial disparities in moneys available per pupil, by reason of heavy reliance upon local property taxes and by reason of substantial disparities in per pupil school district wealth measured by taxable property, do not meet constitutional tests of equal protection of the laws required by the Fourteenth Amendment to the United States Constitution (and in *Serrano* and *Robinson* as required by state constitutional provisions). Those cases do not purport to say precisely how the public schools should be financed. To the contrary, they say that, regardless of the system used, the result should be to avoid the effect of substantial inequality of moneys available for education resulting from substantial inequality of taxable property among districts. It is in this sense that the cases call for "fiscal neutrality." The courts have left it to the state legislatures to develop techniques of financing consistent with that concept.

Consideration of possible corrective measures necessarily commences with existing sources of school funds. School funds in Texas and most other states are derived from three principal sources: local property taxes, some form of state assistance such as the Texas Minimum Foundation School Program Act (TEXAS EDUC. CODE §§ 16.01, et seq.), and federal aid programs.[14] In view of the basic

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tinuation of such security throughout the life of such bonds and notes. Another significant factor relating to the marketability of school bonds and notes secured by property taxes in many or most states is the elasticity of such tax, where such tax is unlimited in rate or amount, to provide the funds necessary to meet debt service requirements by application of whatever rate might be required during the life of the obligations.

[14]In a table, captioned "*A Statistical Primer on Public Elementary and Secondary Education in the United States*, published in the New York Times, January 10, 1972, Section E, p. 2, as part of the newspaper's "Annual Education Review", it was noted that

inter-relationship of these three sources, it is obvious that disparities in revenues resulting from dependence on local property taxes could be reduced or eliminated by increased and properly allocated state support or federal assistance, or both. While the result of efforts at further balancing might be to reduce local property taxes, the abandonment of such taxes is not *required* by any conclusions regarding the Equal Protection Clause drawn by the District Court in *Rodriguez* or by the courts in *Serrano, Van Dusartz* and *Robinson*, even if this Court were to accept the rationale of the District Court in place of *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom., McInnis* v. *Ogilvie*, 394 U.S. 322 (1969).[15]

Both the courts and the commentators agree on this basic proposition and the theme of those decisions is one of permitting the state legislatures great flexibility in establishing systems of school finance consistent with the concept of "fiscal neutrality." Illustrative of the judicial approach is the following statement of Judge Miles Lord in the *Van Dusartz* case, wherein the *Serrano* rationale was adopted:

> ". . . the fiscal neutrality principle not only removes discrimination by wealth but also allows *free*

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expenditures for public schools in 1971 across the nation were estimated to be $44,424,000,000. According to an article in the same edition, Howe, *Wanted: A System of Finance*, Section E, p. 2, about 55% of revenues received by public schools on a national basis came from local sources, about 39% from the state, and about 6% from the Federal Government.

[15]Numerous commissions and study groups have made proposals for school finance reform and increased support or assistance in one form or another. Among alternative proposals generally considered, is an increase in state or federal assistance with a reduction in local property taxes. See generally, *The President's Commission on School Finance, Schools, People & Money, The Need for Educational Reform*, (Final Report, March 3, 1972); *National Educational Finance Project, Future Directions for School Financing* (1971); *Hearings Before the Select Committee on Equal Educa-*

play to local effort and choice and openly permits the State to adopt one of many optional school funding systems which do not violate the equal protection clause." 334 F. Supp. 870, 876-877 (Emphasis added).

The *Van Dusartz* court further said:

"This Court in no way suggests to the Minnesota Legislature that it adopt any one particular financing system. Rather, this memorandum only recognizes a constitutional standard through which the Legislature may direct and measure its efforts. . . ." *Id.* at 877 n. 14.

Likewise, the District Court in the case at bar stated:

"In the instant case plaintiffs have not advocated that educational expenditures be equal for each child. Rather, they have recommended the application of the principle of 'fiscal neutrality.' . . . [T]he state may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child." 337 F. Supp. 280, 283-284.

In the *Robinson* case, the court said:

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tional Opportunity of the United States Senate, 92nd Cong., 1st Sess. Proposals for increased support or assistance in one form or another are actively being considered by many state legislatures and by the federal government. The President of the United States has requested the Advisory Commission on Intergovernmental Relations to review the question of additional federal assistance derived from revenues generated by a value-added tax and the resulting effect on the local property tax structure to qualify for such federal assistance. Previously the ACIR had submitted a report entitled *State Aid to Local Government* (1969) in which the responsibility of the state for financing schools had been discussed. Total abandonment of local property taxes for school purposes would require raising significant revenues from other sources. For instance, in 1969, the local school districts provided from the local property tax an estimated $15.8-billions in revenues for educational purposes out of a total expenditure of $39.5-billion expended for public elementary and secondary education. *Hearings Before the Select Committee on Equal Educational Opportunity of the United States Senate*, 92nd Cong., 1st Sess., Pt. 16 D-3, at 8354b to 8361 (specifically Tables 1 and 12). See also footnote 14, *supra*.

The fact that the local property tax would still be a viable method of raising revenues for school purposes under the *Serrano-Rodriguez* principle has been recognized by the following commentators:

(1) The enthusiastic acceptance of the *Serrano* decision was due largely to the mistaken belief that it would force a repeal of the school property tax and thereby grant the homeowner substantial relief. *The fact is that the local school property tax could continue* under *Serrano* almost as it has, if the state supplemented its yield to uniform level." Freeman, *Should States Finance the Schools,* Wall Street Journal, March 31, 1972, p. 4 (Emphasis added).[17]

(2) ". . . . The very variety of potential, workable solutions, each with its distinct political and social impact, argues for allowing the state legislature to retain the major responsibility for creating any new system. Judicial stipulation of one solution from among what seem to be a number of constitutionally acceptable alternatives would be unnecessarily insensitive to intragovernmental comity. . . ." Recent Cases, 85 HARV. L. REV. 1049, 1057 (1972).

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". . . . Local discretion over educational spending levels could be allowed so long as it were neutral with respect to local wealth. This would be the case if the sacrifice needed to obtain equivalent levels of funding were approximately equal for each school district – that is, if each school district faced equivalent fiscal pressures in its budgetary decision making. . . ." *Id.* at 1058.

(3) ". . . . How can local spending options (unsupervised by the state as to motive and purpose) be retained under *Serrano*? The practical responses lie essentially in larger equalizing aid to districts and/or

[17]Dr. Roger Freeman has served in the administrations of Presidents Eisenhower and Nixon and is currently a senior fellow at the Hoover Institution on War, Revolution and Peace, Stanford University.

smaller differences in their taxable wealth per pupil. Under present systems, meager doses of such equalizing state aid are used to implement an implicit legislative policy that spending may not be *entirely* a function of wealth. Aid for education is dispensed inversely to wealth and (occasionally) positively to tax effort. Under *Serrano* these subventions to the poor districts could be increased to the point at which each district is in effect equally wealthy for purposes of public education; or the district tax bases could be altered to that same end; or both." Coons, Clune & Sugarman, *A First Appraisal of Serrano*, 2 YALE REVIEW OF LAW & SOCIAL ACTION 111, 115 (1971) (Emphasis added).

Thus, whatever the state legislatures or the federal government may do, with or without judicial compulsion, to provide additional moneys for public school education, particularly in areas of low property valuation per pupil, it is apparent that there *need be no* abandonment of local effort through property taxes as an intrinsic part of a total school financing program.

Moreover, it cannot be emphasized too strongly that the allocation of funds to debt service from local property taxes levied for school purposes tends to be a minor part of total school expenditures.[18] Thus, if any restructuring is to be done, even though involving some reduction of local property taxes or perhaps providing for actual payment of debt service from additional sources, the objective

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[18]An examination of the *Hearings Before the Select Committee on Equal Educational Opportunity of the United States Senate*, 92nd Cong. 1st Sess., pt. 16D-3, pp. 8354b-8412 which sets forth the "Report of the Commissioner's Ad Hoc Group on School Finance", and specifically a comparison of Table 1 at page 8355 and Table 3 at page 8356 shows that *total* estimated public school expenditures in 1969 to 1970 were $39,494,111,000 and total estimated *current* expenditures for such period were $32,280,936,000. This difference of $7,213,175,000 or 18% of the total school expenditures was not broken down but clearly included moneys for debt service and, presumably, for direct outlays of capital expenditures.

can be achieved without abandoning local property taxes as the ultimate security, if needed, for payment of such debt service; and there is nothing in the cases from *Serrano* through *Robinson* that would *require* a different result under the Equal Protection Clause. As directed by the District Court and the court in *Robinson*, the local property tax is to remain as the ultimate security for outstanding bonds and notes and interim-issued bonds and notes. The flexibility inherent in the concept of fiscal neutrality is evidenced by those portions of the courts' orders. Logically, and in line with this principle, the property tax as security for bonds and notes issued *even after* any restructuring of the financing system does not have to be foregone. It may well be that other sources of revenue may be made available for actual payment of debt service, but the ultimate security for school debt could continue to be local property taxes to be levied if and to the extent needed to meet debt service.

In summation, the decisions adopting the "fiscal neutrality" concept, including the District Court decision herein, do not and need not affect either outstanding bonds and notes or the ability to issue additional bonds and notes under existing laws, including bonds to fund outstanding notes. The portions of the Clarification of Original Opinion by the District Court in the instant case and the judgment in the *Robinson* case, by which local property tax levies were preserved as security for debt service for the life of

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According to *U.S. Bureau of the Census, Governmental Finances in 1969-1970* (Series GF-70, No. 5), at 43 (1971), the expenditure for capital outlay for local schools was $4,648,100,000. In connection with the percentage of school expenditures used for debt service, Paul Heffernan has observed: "Because of common debt and tax limit requirements, school bond debt service costs generally run around 10% of school district operating budgets. For debt service to exceed 15% of school financing costs would be exceptional." Heffernan, *The Editor's Corner*, The Daily Bond Buyer, January 4, 1972 at 21.

the bonds and notes issued under existing laws, are logically consistent with the determinations made on the merits in those cases.

IV

Property Taxes Levied and Collected by Local School Districts Could Not Be Eliminated as a Source of Security for Outstanding Bonds or Notes Because the Obligation of Such Contracts is Protected Against Impairment by Article I, Section 10, United States Constitution

School bonds and notes are contracts which, as previously discussed in this Brief, are by their terms secured by local property taxes. The inevitable result is that a school district in issuing bonds or notes obligates itself by contract made under state law with the holder of such obligations to provide for the levy and collection of local property taxes to the extent necessary to pay principal and interest, and, where notes have been issued in anticipation of the issuance of bonds, there is an additional contractual obligation to fund such notes at their maturity. All of these obligations are protected by Article I, Section 10, of the United States Constitution which provides that "no State shall . . . pass any . . . law impairing the obligation of contracts."

Such constitutional protection is applicable if this Court affirms the decision of the District Court and thereby directs the state legislature to act but leaves the legislature considerable flexibility in developing a different system of school finance consistent with equal protection requirements. As noted in the previous discussion, the decision of the District Court, like those in similar cases, and the concept of "fiscal neutrality", do *not* require the abandonment of the local property tax. Rather, a broad choice is left to the state legislatures. In such circumstances, certainly the constitutional guarantee against impairment of

the obligation of contracts by legislative action must be adhered to by the legislature. Thus, if this Court finds that existing systems of financing public education are violative of the Equal Protection Clause but such decision can be rendered and implemented without impairing the contractual obligations of school districts to bondholders by judicial decree, as shown above, it logically follows that the legislatures must act in such manner as to satisfy both the Equal Protection Clause and the Impairment of Contract Clause. This is merely applying two provisions of the Constitution in such manner as to give effect to both.[19]

On numerous occasions extending back for decades, this Court has addressed itself to, and has taken a protective stance toward, the rights of bondholders under the "impairment of contract" clause in holding that legislative or constitutional changes restricting or eliminating the tax security for bonds issued under prior laws impair the obligation of contract between the issuing subdivision and the bondholder.[20]

In this regard, and as representative of the principle discussed above, this Court held in *Von Hoffman* v. *Quincy*, 71 U.S. 535 (1866):

> "... Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the indi-

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[19]See, *e.g.*, *Wright* v. *United States*, 302 U.S. 583, 596 (1938); *Williams* v. *United States*, 289 U.S. 553, 572-73 (1933); *Old Wayne Mutual Life Association of Indianapolis* v. *McDonough*, 204 U.S. 8, 15 (1907).

[20]See, *e.g.*, *Wolff* v. *New Orleans*, 103 U.S. 358 (1880); *Ralls County Court* v. *United States*, 105 U.S. 733, 735-38 (1881); *Mobile* v. *Watson*, 116 U.S. 289, 305 (1886); *Scotland County Court* v. *United States ex rel. Hill*, 140 U.S. 41, 45 (1891); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 59-60 (1935).

vidual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. . . . *Id.* at 552.

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"It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right – of no practical value – and render the protection of the Constitution a shadow and a delusion."[21] *Id.* at 554-555.

Thus, it is clear that any state legislative change that might be made in the system of public school financing, either in accordance with a judicial command for "fiscal neutrality" as ordered by the District Court in the instant

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[21]In the *Von Hoffman* case, bonds had been issued under statutes authorizing the levy of a sufficient special tax to pay debt service. Subsequently, the Illinois legislature enacted a statute restricting the amount of taxes which could be levied by the City.

case or by voluntary action, could not constitutionally impair the local property tax *security* for school bonds or notes issued prior to any such change in the state constitution or laws. Even if state legislatures provided for actual payment of debt service from other sources of revenues, the ultimate remedy and security of the bondholder to have local property taxes levied, if necessary, must be left intact.

Thus, it may be seen that the protective order of the District Court is logically and legally sound for the additional reason that it avoids impairment of the obligation of contracts.

V

Even if Ultimate Judicial Determination Required Abandonment of Local Property Taxes for School Purposes, Any Such Determination Could and Should be Given Prospective Effect Only so as Not to Interfere with Local Property Taxes for Debt Service on Bonds or Notes Issued Before An Orderly Change in the Financing System Occurs

As previously discussed, there is nothing in the decision of the District Court or in the other decided cases requiring or even indicating any necessity under the Equal Protection Clause for interfering with the security afforded by the local property taxing power for payment of debt service on bonds or notes;[22] and any attempted interference

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[22]In this regard, it should be noted that the Wyoming Supreme Court in the case of *Sweetwater County Planning Committee* v. *Hinkle*, 491 P.2d 1234 (1971), after stating that new legislation was needed in the area of school financing, observed: "We have been speaking only about the operation and maintenance of public schools and not about the financing of capital improvements. Such financing will in the future have to be done by each school district separately unless and until otherwise authorized. *No invidious discrimination will be involved if bonds are voted by any school district for capital improvements, and if special levies are made within the district to retire such bonds.*" 491 P.2d at 1238 (Emphasis added).

by a legislature in its response to such a decision would run counter to a constitutional prohibition against impairment of contracts. However, even if it were determined that, in some way (not now apparent), the existing security of property taxes for debt service violates the Equal Protection Clause, applicable judicial concepts would preclude the crises, confusion and inequity that would otherwise result from giving immediate effect to such a determination. Rather, under established principles, such a determination would be applied prospectively only, giving due time for orderly transition to a new system. Such an orderly transition would also permit school districts to continue their programs of debt financing without damaging interruptions.

The school segregation remedial decision, *Brown* v. *Board of Education*, 347 U.S. 483 (1954), particularly the supplemental opinion regarding the manner of relief as reported at 349 U.S. 294 (1955), and the legislative reapportionment decision, *Reynolds v. Sims*, 377 U.S. 533, 585-586 (1964), are relevant and convincing precedent for the prospective operation of such a determination. Those cases exemplify the established principle that a finding of existing unconstitutionality where entire systems of conduct must be changed does not require the undoing of what has been done nor immediate corrective action, but that equitable principles should be applied in allowing the necessary time for correction of particularly complex problems, especially where the subject is primarily one for legislative consideration and determination.

This is particularly true in the instant case which, if the District Court's decision is affirmed, would require major legislative policy decisions both within and without the constitutional arena. In *Brown* this Court directed the lower courts to require "a prompt and reasonable compliance" with the earlier ruling of unconstitutionality but

stated further that additional time might be necessary due to administrative problems and revision of local laws. Thus, if this Court in the instant case were to affirm the decision of the District Court, reasonable time must be afforded the legislatures to enact a new system and, during such an interim period, the existing system must be permitted to operate in order for public education and educational capital improvements to be continued.[23]

The applicability of these equitable principles to school financing matters was recognized in the modification of the judgment in the *Serrano* case, where the California Court said:

> "As in the cases of school desegregation (see Brown v. Board of Education (1955) 349 U.S. 294, 75 S. Ct. 753, 99 L.Ed 1083) and legislative reapportionment (see Silver v. Brown (1965) 63 Cal. 2d 270, 281, 46 Cal. Rptr. 308, 405 P.2d 132), a determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or

[23]With respect to the matter of providing a period of time for a legislature to restructure the existing system of finance after the date of any decision affirming or adopting the *Serrano-Rodriguez* rationale, the lower courts should be given discretion to fix a reasonable period of time in light of the particular circumstances in the state involved. The District Court in the instant case, based upon the situation in Texas, prescribed a two-year period during which the legislature was to restructure the system of school finance in Texas. If this Court affirms the District Court decision, such time period should not be viewed as a universally applicable period. Rather, it would seem that such period will depend on the circumstances in each state and should be left to the reasonable discretion of lower courts, which, in fact, may review and revise their order in this respect as the circumstances warrant. In the *Robinson* case, the New Jersey Superior Court simply declared that the property tax security for obligations "heretofore or hereafter issued" under existing laws would continue. A similar protective order was entered on June 6, 1972 in *Hollins* v. *Shofstall*, No. C-253652 (Super. Ct. Ariz., June 1, 1972). As stated in Section III of this Brief, in any event, such orders should not be deemed to affect the security for debt obligations under the "fiscal neutrality" concept.

an immediate implementation of a constitutionally valid substitute. *Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.*" 96 Cal. Rptr. 601, 626, 487 P.2d 1241, 1266 (Emphasis added).

Even in situations where, unlike the instant case, the constitutional infirmities sought to be corrected by the courts could be accomplished by a simple clear-cut judicial act, *e.g.*, prohibiting any imposition of discriminatory voter qualification requirements, this Court has held that its decision should have prospective effect only so that political subdivisions issuing voted obligations would not suffer disruption and hardship in their financing activities and bondholders who had purchased bonds on good faith assumptions would not suffer substantial inequitable results. *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 213-215 (1970).[24]

Thus, it is plain that even if the Texas school finance system were determined to be unconstitutional, and even if, contrary to the views expressed elsewhere in this Brief, the infirmity were deemed to extend to property taxes pledged as security for the payment of debt service on school bonds and notes, it is manifest that the equitable principles discussed above would be applicable to give

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[24]Courts, in deciding if a judicial determination should be applied prospectively only, have considered various factors such as whether a new principle of law is being established, the purpose to be served by the new principle, the reliance placed on the prior rule or system of law, and whether injustice, hardship or an undue burden on the administration of the law can be avoided. See, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 Sup. Ct. 349, 355, 30 L. Ed. 2d 296, 306 (1971); *Williams* v. *United States*, 401 U.S. 646, 652 (1971), 662-665 (Brennan, J. concurring); *Gosa* v. *Mayden*, 450 F.2d 753 (5th Cir. 1971). If the decision of the District Court is affirmed, there could be no question, in view of the historical and almost universal practice of the states, that a new principle of law

such decision only prospective effect so as not to interfere with local property taxes for debt service on bonds and notes issued before an orderly change in the financing system occurs, and thereby avoid disruption and unfairness.

CONCLUSION

Amici curiae repeat that it is not the purpose of this Brief to suggest a conclusion as to the merits of the instant case, and they do not presume that the case will be decided in a fashion that calls for attention to the subject of this Brief. Rather, the undersigned merely submit that, *if* this Court affirms the decision of the District Court and determines that constitutional concepts require some re-ordering of the system of public school finance such a determination need not and should not in any way affect the local property tax security for any school bonds or notes issued prior to any such alteration in that system of financing and need not, under the concept of fiscal neutrality, lead to the abandonment of the local property tax as security for future school debt financing. Thus, if the District Court's decision is affirmed, we respectfully submit that the protective order of the District Court with respect to the local property tax security for school bonds and notes should be

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would thereby be established. Nor is there any doubt, particularly with respect to school bonds and notes, as to the historical, justifiable and indeed, necessary reliance placed on the existing system of local property tax security for such debt obligations. As discussed above, continuation of the local property tax security for debt service, whether or not actually paid from other sources, would not affect at all or to any significant extent the restructuring of the system of school finance to avoid disparities in educational offering resulting from differences in school district wealth. Furthermore, any minor inequalities in interest rates borne by bonds and notes as a result of wealth disparities could be overcome, if necessary, without abandoning the local property tax security. And, clearly, the only way to avoid undue burden and chaos in the administration of state school laws is for a court to apply the principle of prospective effect.

expressly approved by this Court in order to avoid any confusion and allay fears which would otherwise redound to the detriment of local school districts, taxpayers and bondholders.

Respectfully submitted,

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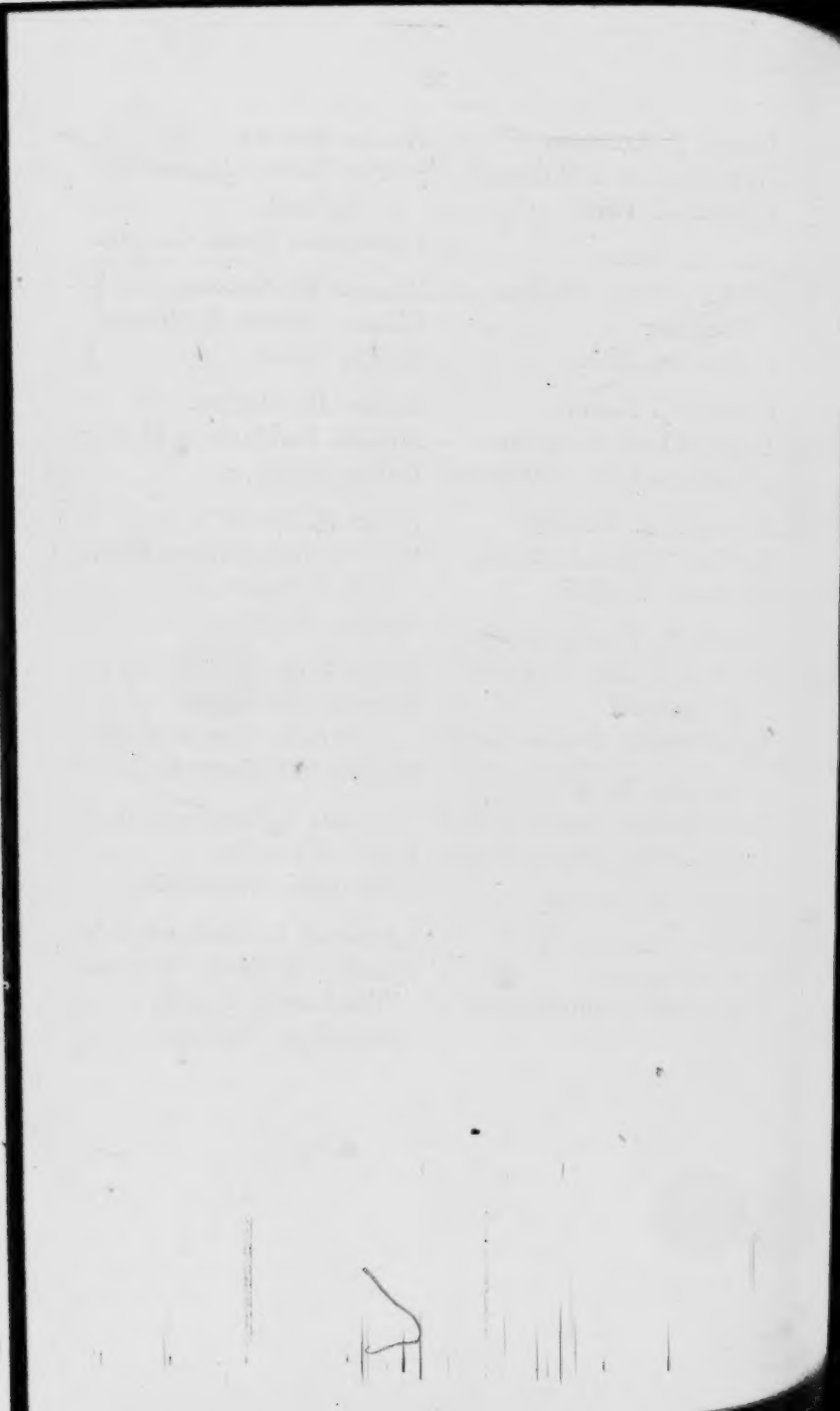
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APPENDIX A

Mortimer G. Newman, Jr.
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KENNETH ROBINSON, an infant by his parent and Guardian ad Litem, ERNESTINE ROBINSON and ERNESTINE ROBINSON, individually; PAUL JORDAN, ARTHUR DWYER, FRANK H. BLATZ, and WILLIAM S. HART, individually and as Mayors respectively of Jersey City, Paterson, Plainfield and East Orange; the Cities of Jersey City, Paterson, Plainfield and East Orange; the Boards of Education of the School Districts of Jersey City, Paterson, Plainfield and East Orange; The Board of School Estimate of Jersey City; and RICHARD F. MCCARTHY; all individually and as representatives of a class or classes,

Plaintiffs,

vs.

WILLIAM T. CAHILL, Governor of the State of New Jersey; JOSEPH M. MCCRANE, JR., Treasurer of the State of New Jersey; GEORGE F. KUGLER, Attorney General of the State of New Jersey; RAYMOND H. BATEMAN, President of the New Jersey Senate and the New Jersey Senate; WILLIAM K. DICKEY, Speaker of the General Assembly of the State of New Jersey and the General Assembly of the State of New Jersey; the State of New Jersey; CARL L. MARBURGER, Commissioner of Education and the Department of Education; the State Board of Education; all in their official and individual capacities.

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION-HUDSON COUNTY DOCKET NO. L-18704-69

Civil Action
JUDGMENT

This matter having been opened to the court by Ruvoldt and Ruvoldt, Harold J. Ruvoldt, Jr. appearing, attorneys for the plaintiffs, and George F. Kugler, Jr., Attorney General of New Jersey, Stephen G. Weiss, Special Counsel, appearing, attorney for defendants, and said attorneys for plaintiffs and defendants having made separate motions for summary judgment and having stipulated to the inclusion in the record of various affidavits submitted on said motions and other data, and the court having heard testimony in trial between November 1 and November 9, 1971, inclusive; and the court having considered arguments and briefs submitted on behalf of the parties as well as *amicus curiae* briefs submitted by various attorneys; and the court having made findings of fact and conclusions of law in a written opinion dated January 19, 1972; for good cause shown,

IT IS on this 4th day of February, 1972,

ORDERED, ADJUDGED and DECLARED that:

1. The present statutory scheme of financing public elementary and secondary schools affords unequal and, in some cases, inadequate educational opportunities to pupils in various school districts of the State;

2. The present system of financing public elementary and secondary schools does not provide a thorough and efficient system of education in New Jersey at the present time as required by the New Jersey Constitution (Article VIII, Sec. IV, Par. 1), although the Bateman Act (L. 1970, c. 234) may do so if fully funded and implemented, without satisfying constitutional requirements for equality referred to below;

3. The present system of financing such public schools discriminates against pupils in districts with low real property wealth and against taxpayers upon whom unequal tax burdens are imposed for a common State pur-

pose in violation of the equality provision of the New Jersey Constitution (Article I, Par. 1) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

4. The State is required to finance a thorough and efficient system of public elementary and secondary education out of State revenues raised in conformity with the requirements of the State and Federal Constitutions as interpreted by the Court in its written opinion; but nothing contained in this judgment or in said opinion shall be construed as requiring the legislature to adopt a specific system of financing or taxation, nor as precluding the taxation of real property for school purposes;

5. This judgment declaring the present financing system unconstitutional shall operate prospectively only and shall not prevent the continued operation of the school laws and tax laws now in existence or any and all actions taken thereunder; and said laws shall continue in effect unless and until specific operations under them are enjoined by the court;

6. No such operations shall be enjoined prior to January 1, 1974, except that, if a nondiscriminatory system of taxation is not enacted by January 1, 1973, then from and after that date no State moneys shall be distributed to any school district pursuant to the "minimum support aid" provisions (N.J.S.A. 18A:58-2 and 5a) and the save harmless provision (N.J.S.A. 18A:58-18.1; L. 1970, c. 234, sec. 15, as amended) of the Bateman Act; and, in that event, the funds that are thereby set free shall be redistributed by appropriate State officials in a manner that will effectuate as far as possible the principles expressed in the written opinion of the court, more specifically, by raising the guaranteed valuations to the highest level that a proportionate distribution of funds will permit, utilizing the remaining provisions of the Bateman Act; provided,

however, that no such distribution of minimum aid and save harmless funds shall be made without further order of this court, and, in any event, the Commissioner of the State Department of Education, State of New Jersey, on or before November 15, 1972, shall formulate and submit to this court for approval a plan for the effectuation of this provision prior to putting it into effect; and provided, further, that the State Board of Education and/or the Commissioner of the Department of Education, State of New Jersey, may propose an alternate plan or plans for the use or distribution of said minimum support aid and save harmless funds to effectuate the principles expressed in the written opinion of this court in the event this injunction shall become operative, said plan or plans to be submitted on or before November 15, 1972;

7. Notwithstanding any of the foregoing terms or provisions hereof, nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations (all herein called "obligations"), or the expenditure or other application of proceeds of any such taxes or obligations; and for so long as any of such obligations shall remain unpaid as to any principal or interest, nothing herein contained or done pursuant hereto shall be applied or construed to affect the validity or binding effect of such obligations, the creation or legal existence of the issuer thereof, or shall, in the event any of such obligations shall not be paid as to principal or interest when due, invalidate, modify or otherwise affect the meaning or legal effect of any laws or statutes of this State in effect at time of issuance of such obligations relating to the assessment, levy or collection hereafter and the application of property taxes to pay such principal or

interest or judgments therefor or relating to the enforcement and payment of any such obligations or judgments and interest thereon;

8. Defendants' motion to change the dates fixed in paragraph 6, above, to a period of 2 years after final disposition by the Supreme Court of New Jersey of the appeal to be filed by defendants, or not earlier than January 1, 1974, is hereby denied.

9. The court hereby retains jurisdiction for such modification or further order as may be required.

/s/ T. I. Botter

Theodore I. Botter, J.S.C.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Mortimer G. Newman, Jr.
Clerk

APPENDIX B

Expenditures For Local Public Schools by Object Actual and Projected, Selected Fiscal Years 1955-1980

Fiscal Year	Total local schools	Current operations: Total current	Current operations: Average per pupil	Capital outlay
	Amount (millions)			
Actual:				
1955	$10,129	$ 7,390	$ 274	$2,739
1960	15,166	12,263	378	2,903
1965	21,966	18,679	484	3,287
1970	37,461	32,803	776	4,658
Projected:				
1975	55,466	49,862	1,176	5,604
1980	78,875	71,993	1,706	6,882
	Percentage change over selected intervals			
1955-60	+ 49.7	+ 65.9	+ 37.8	+ 6.0
1960-65	+ 44.8	+ 52.3	+ 28.0	+13.2
1965-70	+ 70.5	+ 75.6	+ 55.3	+41.6
1970-75	+ 48.1	+ 52.0	+ 51.5	+20.3
1975-80	+ 42.2	+ 44.4	+ 45.1	+22.8
1960-70	+147.0	+167.5	+105.3	+60.5
1970-80	+110.6	+119.5	+119.8	+47.7

Source: Basic data from U. S. Department of Commerce, Bureau of the Census. Computations and projections by Tax Foundation, Inc.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al.,

Appellants,

vs.

DEMETRIO P. RODRIGUEZ, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE: RICHARD M. CLOWES, SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF LOS ANGELES, HAROLD J. OSTLY, TAX COLLECTOR AND TREASURER OF THE COUNTY OF LOS ANGELES; EL SEGUNDO UNIFIED SCHOOL DISTRICT; GLENDALE UNIFIED SCHOOL DISTRICT; SAN MARINO UNIFIED SCHOOL DISTRICT; LONG BEACH UNIFIED SCHOOL DISTRICT; SOUTH BAY UNION HIGH SCHOOL DISTRICT; BEVERLY HILLS UNIFIED SCHOOL DISTRICT; AND SANTA MONICA UNIFIED SCHOOL DISTRICT, ALL OF LOS ANGELES COUNTY.

INTERESTS OF AMICI

Amici Curiae are (1) the County Superintendent of Schools and the Treasurer-Tax Collector of the County of Los Angeles who are charged with administering certain aspects of the California public school financing system as it affects local school government in Los Angeles County, and (2) several school districts in the County of Los Angeles. Amici are spon-

sored by John D. Maharg, County Counsel of Los Angeles County, their authorized law officer. Amici, with the exception of one of the school districts, are all parties defendant (the school districts by way of intervention) in the case of *Serrano v. Priest* (Los Angeles Superior Court No. C938254) which is now proceeding to trial in a California Superior Court, upon remand from the California Supreme Court. See *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601.

In the action presently before this Court, the court below cited the opinion of the California Supreme Court in *Serrano v. Priest, supra* (1971), in support of its conclusion that Appellees are deprived of equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the operation of the Texas public school financing system. *Rodriguez v. San Antonio Independent School District,* 337 F.Supp. 280, 281 (n. 1) (1972).

The school districts appearing as amici are charged with the operation of public schools within Los Angeles County, all of which would be adversely affected to a serious degree by application of the rule urged by Appellees and adopted by the court below. The Texas public school financing system is substantially similar to the system of financing public schools in California.[1]

[1]The California and Texas school financing systems are similar in effect to the systems used in 49 of the 50 states. Hawaii is the only state without local school district control of education. See *Hawaii Rev. Laws,* §§296-2, 298-2 (1968).

Amici are gravely concerned that the "equal protection" standard of review as applied to state public school financing systems by the court below in this case, and by the California Supreme Court in *Serrano v. Priest, supra,* if upheld by this Court, would place a constitutional straitjacket upon local school boards, state legislatures and Congress in their attempts to solve and adjust the myriad of problems involved in the day-to-day and on-going operation of this nation's public school systems.

Amici believe that one of the geniuses of the public school systems in America in general, and California in particular, has been the incentives for and abilities of local school boards and state legislatures, democratically elected, to experiment and innovate in finding solutions to educational problems, many of which are of purely local concern and others which are of universal application. The responsiveness of the local school district to the needs, desires and problems of the local populace would inevitably be drastically impaired by application of the constitutional rule of law sought to be established by Appellees.

STATEMENT

This case presents to this high Court fundamental questions concerning the drastic restructuring of a state's local governmental services, and the role to be played by the judicial branch of government in doing so. The impact of the decision to be made in this case

will be felt not only by the thousands of school districts in 49 of the 50 states, but by reason of the logical difficulties in distinguishing educational services from other important governmental services provided by local units of state government, the impact of this decision will surely be felt by almost all such local governmental units with respect to their provision of important services in their respective communities.[2]

The strategies employed in this case were fully mapped out in 1970 by Professor Coons and his associates in their book "Private Wealth and Public Education."[3] This book was dedicated by its authors "To nine old friends of the children," and the validity of the arguments contained in their book are now presented to this Court for determination.

It is this book that first presented the disarmingly simple formulation of a proposed new principle of "equal protection" constitutional law. Coons' "simple" formula is: "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." (Coons, et al., *supra*, Footnote 3, Introduction, p. 2.)

It may be seen from the Order appealed from that the District Court below fully embraced this formula.[4]

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[2]A lawsuit challenging state and local legislation regulating the funding of police and fire protection services on the basis of the *Serrano* rule has already been filed in California. A *"Serrano"*-type complaint, *San Anselmo Police Officers Association, et al. v. The City of San Anselmo, et al.*, 61302, was filed on May 3, 1972, in the County of Marin.

[3]Coons, John P., Clune III, Wm. H., Sugarman, Stephen D., *Private Wealth and Public Education*, the Belknap Press of Harvard University Press, Cambridge, Mass. (1970).

[4]337 F.Supp. 280, 285-286.

The California Supreme Court, the first to declare an entire state's system of financing its public schools to be unconstitutional, likewise adopted Coons' thesis.[5]

The California Supreme Court emphasized in its Modification of Opinion that inasmuch as the case involved an appeal from a judgment of dismissal entered upon the sustaining of general demurrer to the Complaint, it was not a "final judgment on the merits." The Supreme Court remanded the case to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time to answer. The Answer was filed on May 1, 1972, and the case is now being prepared for trial.

As Coons points out, the system of financing public schools which is here under attack is one of many variations of the so-called "foundation plan." The conceptual basis for the "foundation plan," the purpose of which was to make adjustments in state contributions to public school districts within the state to account for district wealth variations, was originated by George D. Strayer and Robert M. Haig in 1923.[6] The "foundation plan" as utilized by most of the states with numerous variations was developed by Paul R. Mort.[7]

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[5]*Serrano v. Priest*, 5 Cal.3d 584, 589, 487 P.2d 1241, 96 Cal. Rptr. 601: "We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."

[6]Strayer, G. D. and Haig, R. M., *Financing of Education in the State of New York* (New York, 1923).

[7]Coons, *supra*, p. 63; Mort, P. R., Reusser, W. C. and Polley, J. W., *Public School Finance*, 3d Ed. (New York, 1960).

Amici will not undertake to describe the "foundation plan" used in the State of Texas, which is under attack here, as this will no doubt be fully described in the briefs of the parties to the suit. The California Foundation Program is described by the California Supreme Court in *Serrano v. Priest,* 5 Cal.3d 584, 591, 595.

SUMMARY OF ARGUMENT

1. The District Court below erroneously held that the complex system of laws providing for the financing of the Texas public school system violates the "equal protection" clause of the Fourteenth Amendment to the United States Constitution. The District Court erroneously applied the onerous standard of review whereby the defendants were required to carry the burden of showing that its legislative classifications were necessary to promote compelling state interests. The first question to be resolved in this case is "What standard of review is to be applied in determining the validity of the complex public school financing laws?" In uncritically relying upon *Serrano v. Priest,* 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601, the District Court failed to consider vital questions and factors. The District Court should have carefully analyzed the alleged suspect classification of wealth and noted that this classification involved wealth of school districts and not wealth of people. The District Court should have noted that the alleged "fundamental" interest (quality of education) allegedly affected by the alleged

"wealth" classification was not an interest of people in quality education but rather an interest in not being unduly burdened in paying taxes. The court failed to take into consideration, in determining its standard of review, numerous other factors, including the individual interests of parents in directing the upbringing and education of their children, vital societal or governmental interests in permitting within reasonable limits local community control in making decisions affecting the schooling of the children in the community and in allocating local public funds in support thereof, the necessity of permitting the Legislature and Congress to remain free of a constitutional straitjacket with respect to their efforts to improve public education and make innovations therein, and the ability of the courts to fashion and enforce fair and appropriate remedies as compared with the ability of the Legislature and Congress to deal with the complex and rapidly changing problems in public education. Applying all these considerations, the standard of review to be applied to this complex set of school financing laws must be less onerous than the one applied by the District Court.

2. Under any standard of review which might fairly and reasonably be applied to the complex school financing laws of Texas, the laws are valid under the equal protection clause. The people of Texas, including the parents of children attending public schools in that state, have expressly attempted to preserve and protect, through their financing system, their compelling interest in assuring essential educational services for

all children, while at the same time making appropriate accommodations to the vital interest of parents in local communities in the course those educational services take. The individual, societal and governmental interests served by the Texas school financing laws are not merely important, they are compelling. This is true especially when it is considered that the school financing laws are necessarily complex if they are to attempt to make provision for the differing educational needs of students, and the inability of plaintiffs to establish feasible and better alternatives to meet those differing educational needs while accommodating a reasonable degree of local decision-making with respect to the education of the children. The classifications made in the school financing laws of Texas promote these compelling interests in such a way as to satisfy any realistic standard of judicial review.

3. Independent of the foregoing, the monumental nature of the task of more fairly allocating financial resources of the state among the school districts is one which the courts are not equipped to tackle. This necessarily complex, t i g h t l y interwoven and rapidly changing set of laws calculated to approach excellence in the providing of educational services to students of widely varying educational needs, is such that only the Legislature, local school boards, and Congress are equipped to handle. The resources available to them far outstrip the resources available to the courts to deal with these complexities. These problems are far better tackled by experts working together t o w a r d

common goals than by courts relying upon the services of experts in adversary proceedings. Were the courts to undertake the staggering task of closely monitoring efforts of the Legislature, school boards and Congress with respect to their efforts to improve the quality of public education, they would to that extent encourage those bodies to deem themselves absolved of their responsibilities, with the further adverse consequence of subjecting the results of such efforts as they might continue to make to extreme uncertainty, with resulting doubts as to the validity of school district taxes and contractual commitments. The courts should accordingly exercise judicial restraint and evidence their faith in the democratic processes, the arena in which solutions to these complex problems have historically and are now being hammered out.

4. In any event, the judgment below should be reversed because the order granting the injunction lacks specificity and fails to describe in reasonable detail what the defendants must do in order to avoid the drastic contempt remedy available to enforce the order. The order, in enjoining the defendants from giving any force or effect to the Texas school financing laws "insofar as they discriminate against plaintiffs and others on the basis of wealth other than wealth of the State as a whole," clearly fails to comply with the requirements of Section 65(d) of the Federal Rules of Civil Procedure. In further ordering that named defendants be ordered to reallocate the school funds "in such a manner as not to violate the equal protection provisions

of both the United States and Texas Constitutions," the order even more clearly violates the provisions of Rule 65(d). The Judgment below should also be reversed because of failure of the plaintiffs to include as defendants those authorized by law to carry out an effective decree, namely, the Legislature and the Governor.

ARGUMENT

I

THE DISTRICT COURT ERRED IN APPLYING THE "COMPELLING INTEREST" TEST RATHER THAN A LESS ONEROUS STANDARD OF REVIEW IN TESTING THE VALIDITY OF THE TEXAS SCHOOL FINANCING LAWS.

A. The District Court, in the course of uncritically relying upon Serrano, erroneously concluded that the "necessary to promote a compelling state interest" test should be applied.

The District Court below followed the decision of the California Supreme Court in *Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971) in determining that the onerous "compelling interest" test should be applied in determining the validity or invalidity of the system of laws of the State of Texas making provision for the financing of the public schools. In footnote 1 the District Court stated: "Serrano convincingly analyzed discussions regarding the suspect nature of classification based on wealth . . ."

(337 F.Supp. 280, 281.) (Professor Goldstein of the University of Pennsylvania has written a most penetrating analysis of the elusive principles of law involved in *Serrano v. Priest,* which amici believe to be so valuable in analyzing the issues involved that we attach a copy of his article, "Interdistrict Inequality in School Financing: A Critical Analysis of *Serrano v. Priest* and Its Progeny," 120 Univ. of Penn. L.R. 504 (1972). (See Appendix A.) The extreme importance of this case appears to amici to provide complete justification for commending to this busy Court that it read Professor Goldstein's thought-penetrating analysis.)

In relying heavily upon *Serrano,* the District Court did so uncritically. It failed to note, for example, that the case came to the California Supreme Court by way of appeal from a judgment of dismissal entered after sustaining the defendants' general demurrers, and that accordingly the California Supreme Court assumed that all material allegations in the complaint were true.

Thus, the Supreme Court assumed for the purposes of its decision that different levels of educational expenditure affect the quality of education. (5 Cal.3d 584, 599 n. 14, 601 n. 16, 487 P.2d 1241, 1251, 1253.) The California Supreme Court specifically noted that these were matters which would be the subject matter of proof in the trial court upon remand.

The California Supreme Court also assumed for the purposes of its decision the truth of plaintiffs' allegation that there is a correlation between a district's per

pupil assessed valuation and the wealth of its residents. (5 Cal.3d 584, 600-601, 487 P.2d 1241, 1252.)

The District Court below, in failing to set forth any determination that higher expenditures for education result in better education, apparently relied upon the *Serrano* decision, which, as indicated, assumed . . . the truth of that proposition without deciding it because the case arose by way of demurrer.

As pointed out by Goldstein (App. A, pp. 26-29) research reports so far have found little relationship between expenditure levels and the educational outputs measured, when other variables were held constant, and since *Serrano* sent the matter back to the trial court, "the issue still remains open for proof, proof that does not appear to be available."

The significance of the lack of proof in the District Court below and in *Serrano* is that plaintiffs have failed to satisfy their burden of proof as to the cost-quality correlation in order to invoke the ultimate constitutional principle which they urged upon, and which was adopted by, both courts, i.e., "The quality of public education may not be a function of wealth other than the wealth of the state as a whole." (Goldstein, App. A, p. 14.) To fit educational expenditures into this formula, it becomes necessary to equate educational spending w i t h quality of education. The District Court's uncritical reliance on *Serrano* to equate these two factors was thus unwarranted.

The District Court below also lacked adequate basis for its conclusion that the Texas financing system draws distinctions based upon the wealth of its citizens, in relying upon *Serrano* and upon an affidavit submitted at trial. As noted in Goldstein (App. A, p. 33), the affidavit relied upon by the District Court "was a questionable source; a careful reading of the data contained in the affidavit creates grave doubts about the validity of its conclusions."

The fact of the matter is that both *Serrano* and the *Rodriguez* courts relied upon the extremes presented by statistics, failing to take account of the peculiarities which might be involved in those extremes and ignoring the clustering of the data between the extremes.

It must be readily apparent that some of the people living in at least some of the "poorer" school districts are richer than some of the people living in some of the "richer" school districts. There is nothing on the face of the Texas school financing laws which draws a distinction in distributing the State largesse among the districts which diminishes or withholds its allocations based on low wealth of any individuals. The legislative classifications make no invidious discrimination against people based on their wealth, but rather distribute state school funds to the districts in such a way that districts with lower tax bases are in some cases unable to raise the same number of dollars per pupil as those with higher tax bases. If there is "wealth discrimination" in the State financing system, it is against districts, not people.

The districts, as political subdivisions of the State, enjoy no protection under the equal protection clause against actions of the state.[8] Those who have standing to complain, people, are not discriminated against "on the basis of their wealth." The so-called "suspect classification of wealth" relied upon in *Serrano* and *Rodriguez,* simply does not exist as to those who bring this action and, accordingly, there is no basis for invoking the "compelling interest" test.

The *Rodriguez* court also failed to note that the wealth classification cases relied upon in *Serrano* were cases involving total denial of important rights to indigent persons, such as the right to vote or to be free from imprisonment as a result of criminal prosecution. Here, the question is not one of denying to the poor or to any person the important right to be educated, but rather the question of the *extent* to which the states may exercise discretion in distributing state funds for education differentially in different territories of the state. Actually, both Texas and California distribute more state funds per pupil to those districts with lower assessed valuation per pupil; what the plaintiffs complain about is that the State does not discriminate enough against people living in wealthy areas in favor of those living in poorer areas.[9] As pointed out in Goldstein, App. A, p. 48:

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[8]*Carmichael v. Southern Coal Co.,* 301 U.S. 495, 81 L.Ed. 1245 (1936); *Hess v. Mullaney* (9th Cir. 1954) 213 F.2d 635, cert. den. sub nom. *Hess v. Dewey,* 348 U.S. 835 (1954); *Board of Ed. of Ind. Sch. Dist., 20, Muskogee p. State of Oklahoma* (10th Cir. 1969) 409 F.2d 665.

[9]Would plaintiffs' argument not also constitutionally require California to more steeply graduate its income tax rate (presently 1 to 10%)?

"The real problem is the individual taxpayer's difficulty in paying his tax bill. If *Serrano* labels relative deprivations among districts unconstitutional, then does its logic not require elimination of disproportionate sacrifice among those who pay the tax? Does the former proposition even make any sense without the latter?

"If there is a constitutional vice created by the differential ability of taxpayers to meet their obligations, does this then mean that proportional, or even progressive, taxation is constitutionally compelled? It is doubtful that the *Serrano* court meant to suggest this outcome. Nevertheless, without such a conclusion it is difficult to understand why it is unconstitutional to have a system whereby one district can more easily raise revenue than another. It is indeed probable under present financing systems, including that of California, that the average resident of a rich district pays higher taxes, in terms of gross dollars, for his schools than does the average resident of a poor district, despite the fact that the resident of the rich district is taxed at a lower rate. This may be the result of the higher assessed valuation and, perhaps, larger average property holdings of the individual taxpayers in the rich district. A correlation may even exist between the amount of tax dollars paid by the average resident of a district and the educational expenditures of that district. If this is so, the difficulty is not with disproportionate payments but with inequitable taxation, not only in the hypotheticals above. but also in the existing financing schemes. The logic of *Serrano,* which invalidated these existing financing schemes, may

therefore require the wealthy taxpayer to bear a greater burden than just having to pay more tax dollars than the poor. Instead it may demand at least a proportional tax system, and possibly one that is progressive."

B. In determining the standard of review to be applied in an "equal protection" case, all pertinent factors should be considered.

This case presents to this high Court an unparalleled opportunity to initiate the establishment of more definitive guidelines for determination of the degree of closeness of judicial scrutiny to be applied in cases impugning the validity of statutes under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The complexity of the public school financing laws of the State of Texas, and other elements in this case hereinafter analyzed, demonstrate the need for more definitive guidelines in establishing the all-important standard of review to be applied.

As previously noted, the Court below relied heavily on the reasoning of the California Supreme Court in *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *Serrano* reasoned that a "suspect classification" (wealth) taken together with a "fundamental interest" (education) automatically invokes application of the "compelling interest" test. Under this test, the state must show that the classifications made by the legislation in question are *necessary* to promote

a *compelling* interest of the state. (*Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995 (1972).) If there are other reasonable ways to achieve compelling state interests with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference; it must choose "less drastic means." (31 L.Ed.2d at 285; *Shelton v. Tucker,* 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960).)

But it is backwards reasoning to conclude from the combination of a "suspect classification" and a "fundamental interest" that the onerous "compelling interest" test is to be applied.[10] Rather, the first question to ask in any equal protection case is "What standard of review is to be applied?" As stated in *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, 99, 92 S.Ct. 849 (1972):

> "The threshold question to be resolved is whether the filing fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review. * * * "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."

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[10]In *Dunn v. Blumstein, supra,* Mr. Chief Justice Burger dissenting, stated: "In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmounatble standard, and I doubt one ever will, for it demands nothing less than perfection." (31 L.Ed.2d at 296.)

To which may be added, perfection is not the standard of excellence that can be expected of our democratic and republican processes as carried on by legislative bodies comprising elected representatives of peoples with widely varying and competing interests.

That more than a simplistic approach to the standard of review is and should be required, is further evidenced by the recent pronouncement of this Court in *Wisconsin v. Yoder,* 405 U.S. ....., 32 L.Ed.2d 15, 24, 92 S.Ct. 1526 (1972), in which the Court stated:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare [them] for additional obligations.' 268 U.S. at 535, 69 L.Ed. at 1078."

See also *Schilb v. Kuebel,* 40 L.W. 4107; *James v. Strange,* 40 L.W. 4711, 4714.

In view of the extreme importance of the standard of review to be applied, and in view of the extreme uncertainty as to the meaning of the term "fundamental interest,"[11] it seems apparent that the courts should not blind themselves to any relevant factors in determining the standard of review to be applied.

This Court has wisely limited application of the onerous "close scrutiny" standard of review to cases

[11]It may be extremely difficult in future cases to distinguish between public education on the one hand, and a host of governmental services on the other hand, with respect to the "fundamental" character of the interests involved, e.g., health, welfare, police, fire, and sanitary services. The courts should leave themselves open to examine these important governmental services in the light of all relevant considerations in determining whether or not they are to be subjected to the virtually impossible burdens of the "compelling interest" test.

in which inherently suspect classifications and well recognized fundamental interests are clearly and definitely involved and affected. (See *Griffin v. Illinois,* 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Harper v. State Board of Elections,* 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966); *Bullock v. Carter,* 405 U.S. 134, 31 L.Ed.2d 92, ..., 92 S.Ct. 849 (1972); and *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995 (1972).)

In determining the standard of review to be applied in an equal protection case, and in this case involving extensive and intricately interwoven laws providing the system for financing the schools of the State of Texas, the Court should carefully consider (1) the character of each interest allegedly affected by the legislation, (2) the degree to which each interest is affected, (3) the interrelationship of each *basis* of the legislative classification in question with each *basis* or *reason* for determining whether the interest affected is so vital as to be denominated as "fundamental," (4) the anticipated impact of judicial intervention on the societal or governmental interests promoted by the legislation, and (5) the ability of the courts to fashion and enfore a fair and appropriate remedy. (*Bullock v. Carter, supra, McDonald v. Board of Elections Commissioners,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969); *Dandridge v. Williams,* 397 U.S. 471; *Jefferson v. Hackney,* 40 L.W. 4585 (1972); *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274, 284, 92 S.Ct. 995

(1972).) Thus, for example, in *Bullock v. Carter*, the Court carefully analyzed the effect of the Texas candidate filing fee system on all interests affected, including the rights of individuals to vote, before concluding that close judicial scrutiny was required because the system had both a "real and appreciable impact on the exercise of the franchise" and a relation to the "resources of the voters supporting a particular candidate." (405 U.S. 134, ..., 31 L.Ed.2d 92, 100.)

When all of the foregoing factors are carefully considered and their interrelationships analyzed, amici submit that it becomes clear that some standard of equal protection review less onerous than the "necessary to promote a compelling state interest" test should be applied to the complex and vitally important school financing laws of the State of Texas.

In sum, the first question to ask in approaching an equal protection case such as this is "What standard of review is to be applied?", and all relevant considerations should be taken into account, inasmuch as deciding upon the standard of review is virtually to decide an equal protection case.

C. Consideration of all pertinent factors involved in this case requires that a less onerous standard of review be applied in testing the validity of the complex Texas school financing laws under the equal protection clause.

Professor Goldstein's article (App. A) points up the opportunity to sharpen the judicial tools available in determining the standard of review to be applied in equal protection cases. This case presents such an opportunity inasmuch as the statutory scheme challenged here on the basis of the equal protection clause is much more complex and presents much greater difficulties than were presented in the cases utilizing the "close scrutiny" test, primarily the school desegregation cases, the reapportionment cases, and the cases dealing with the rights of persons accused of crime to free transcripts or free counsel.

Goldstein's approach is that it is not appropriate to simply examine the legislative classifications, the interests affected thereby and the degree to which the interests are promoted by the means adopted by the Legislature. Goldsein's approach, and we submit it is correct, is that each *basis* of the legislative classification in question is to be examined with respect to its relationship with each *basis* or *reason* for determining that the interest affected is so vital as to be denominated as "fundamental." (App. A, pp. 26, et seq.)

Accordingly, utilizing the approach of considering all relevant factors in the light of Goldstein's sugges-

tions, we turn to examine those factors relevant to determining the appropriate standard of judicial review to be applied in this case.

1. The individual interests involved.

The lower court in the instant case found that "the great significance of education to the individual" was further justification for application of the demanding close scrutiny test. (337 F.Supp. 280, 283.) Nowhere in its opinion, however, does the court identify or analyze the extent to which this interest of the individual is affected by the Texas financing system or the extent to which any adverse effect can or will be remedied by the Court's judgment.

There is no contention in the instant case that the Texas school finance system operates to deny an education to any individual or group of individuals. Indeed, it is at once apparent that the Texas financing system, as does California's, guarantees what the Legislature has determined to be minimum essential educational financing for each pupil through the Minimum Foundation Program (Texas Ed. Code §§16.01, et seq.)[12] The people of Texas, therefore, have not simply undertaken to provide for public schools but have assured support for essential educational programs for each individual attending those schools.

Since it is readily apparent that the financing sys-

[12]California's Foundation Program formulas are found at §§17651-17680, 17702, 17901 and 17902 of the California Ed. Code.

tem does not deny any individual an education, it seems necessary to consider the extent to which the financing system impairs or effects that interest, if at all. The court below apparently did not consider the impact of the financing system on the education an individual receives.[13]

The empirical data amassed in continued efforts to determine factors positively correlated to measurable educational outputs have, to date, failed to support any findings of affirmative correlation between expenditure levels and education outputs. The Coleman report,[14] the findings of which have recently been reaffirmed,[15] found that the expenditure levels and resources of a school system, and even the system itself, have little if any true effect upon educational achievement, and that the two major determinants of educational achievement are the family background of the student and influences of his peer group. (See Coleman, et al., *Equality of Educational Opportunity,* U.S.

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[13]Nowhere in its opinion does the court below discuss the effect of the financing system on the education that is afforded individuals by the Texas school systems. Instead, the court appears to focus solely upon the disparities in tax rates, property valuations, and expenditures, and upon the relative abilities of "wealthy" and "poor" districts to raise additional funds over and above the Foundation Program amounts. The California Supreme Court in *Serrano v. Priest,* was not confronted with this issue, due to the procedural status of that case. As stated by the Court:

> "Defendants contend that different levels of educational expenditure do not affect the quality of education. However, plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true." *Serrano v. Priest,* 5 Cal.3d 584, 601, 487 P.2d 1241, 1253, 96 Cal.Rptr. 601, ..., n. 16.

[14]Equality of Educational Opportunity, U.S. Dept. of H.E.W., U.S. Govt. Printing Office (1966).

[15]Mosteller & Moynihan, "A Pathbreaking Report" in On Equality of Ed. Opportunity, pp. 36-45; see also Averch, Pincus, et al., How Effective is Schooling? (Rand Corp. 1972).

Dept. of H.E.W., U.S. Govt. Printing Office [1966] at p. 325.)

Coons and his associates make it crystal clear that when they refer to "quality" of public education in the first term of their formula, they are referring to money, and not to actual educational outputs.[16]

While there is no question that education is an interest of vital importance to both the individual and society in general,[17] there is nothing in the record of this case nor the literature and studies in the field of education to indicate that these interests are adversely affected by a school financing system such as the one in question. Unlike the cases involving rights to criminal process and voting rights, where the evil to be remedied[18] could easily be seen to substantially impair the individual interest involved, there is no reliable

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[16]"If we are to speak of equality, we must first reckon with quality. There must be some standard for judging whether education is better in one district than in another. We have already distinguished two basic views of equal opportunity—the objective school concept and the subjective child-performance concept—and the difference is relevant here. Having chosen the objective standard, the measure of quality becomes not what is achieved but *what is available*. This way of stating the issue very nearly dictates the answer. What is available becomes whatever goods and services are purchased by school districts to perform their task of education. Quality is the sum of district expenditures per pupil; quality is money.

"This approach may appear excessively formal, but it has significant advantages. Its employment reduces the problem of quality to manageable simplicity. . . .

* * *

"The formal dollar standard for measuring quality would suffice as a basis for our central theme, that wealth must not determine the quality of public education; indeed, it is an integral part of that theme. . . ." [Emphasis theirs; Coons, et al., *Private Wealth and Public Education, supra*, pages 25-26.]

[17]*Brown v. Bd.*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 32 L.Ed.2d 15; *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

[18]e.g., denial of transcript, *Griffin v. Ill.*, 351 U.S. 12 (1956) and attorney, *Douglas v. Calif.*, 372 U.S. 353 (1963) to indigent defendants; denial of vote to indigents—*Harper v. St. Bd. of Elections*, 383 U.S. 663 (1966),

data which indicates that the "evil" of the financing system sought to be restructured by plaintiffs—differential availability of financial resources per pupil—has any adverse effect on an individual's interest in education.

Legislation affecting the right of a person to avail himself of governmental services, such as education, has not been, and should not be, subjected to the same closeness of judicial scrutiny as legislation affecting the constitutionally protected right to vote, the fountainhead of all our rights. Indeed, other interests such as the individual's right to subsistence and shelter would appear to have at least as substantial an effect on an individual's opportunities to survive and succeed in society as education. Yet, this Court has determined that legislative enactments affecting these latter interests are not subject to strict judicial scrutiny. (*Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, ... U.S. ....., 32 L.Ed.2d 285, 92 S.Ct. ..... (1972); *James v. Valtierra*, 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331.)

Actually, the interest of individuals upon which the court below focused appears to be the individual interest of local property taxpayers in achieving the same ability to raise tax dollars for education as other taxpayers with the same tax rate, regardless of varying property valuations. The logical conclusion, if this interest were to be accorded favored constitutional pro-

dilution of voting power, due to malapportionment *Reynolds v. Sims*, 377 U.S. 533; and primary filing fee requirements, *Bullock v. Carter*, 405 U.S. 134, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972).

tection, would appear to be that progressive taxation is compelled.[19] This Court has held, however, that the benefits to which a taxpayer is constitutionally entitled are those derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the expenditure of public monies for public purposes, and that the benefits received need not be porportional to the burdens imposed by taxation. (*Carmichael v. Southern Coal Co.*, 301 U.S. 495, 81 L.Ed. 1245, 57 S.Ct. 868.)[20]

The many factors involved in the individual taxpayer's choices as to government services to be provided by his taxes, and the relative abilities among taxpayers to pay for those services which affect the tax rates of local school districts, were recognized by the courts in *McInnis v. Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968) aff'd. sub nom. *McInnis v. Ogilvie,* 394 U.S. 322 (1969), and *Burruss v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969) aff'd. 397 U.S. 44 (1970).[21]

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[19]Goldstein, App. A, p. 49.

[20]Also, it has been held that distribution and utilization of property taxes is a matter within the discretion of the state, and that use of taxes in the county or district where they were raised does not constitute an invidious discrimination or an unreasonable classification. (*Board of Ed. of Ind. Sch. Dist. 20, Muskogee v. State of Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969); *Hess v. Mullaney,* 213 F.2d 635, 639-40 (9th Cir. 1954).)

[21]The three-judge court in *Hargrave v. Kirk,* 313 F.Supp. 944 (1970), reversed on other grounds sub nom. *Askew v. Hargrave,* 401 U.S. 476, distinguished the operation of the Florida Millage Rollback Act from the financing system involved in *McInnis* on the basis that the property tax ceiling established by the Florida Act prevented local districts from raising more money locally to finance their children's education, thereby requiring them to spend less even if they desired to spend more. This vice is not present in the Texas or California financing systems, which are essentially identical to the systems of Illinois and Virginia. The *Hargrave* court stated, at 313 F.Supp. 944 at 949:

> "Irrespective of the plaintiffs' successful attack on the Act, we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much

Indeed, it has been noted that the economic burden of the average resident of a so-called rich school district may be greater than that of the average resident of a poor district, because he pays higher taxes in terms of gross dollars for his schools and, in addition, the cost of his child's education may be substantially reflected in the price of his home.[22]

2. The actual character of the alleged classification.

The three-judge District Court, relying upon the direction of the California Supreme Court in *Serrano v. Priest, supra* (337 F. Supp. 280, 281 n. 1),[23] and the line of U.S. Supreme Court criminal process and voting rights cases[24] recognized in *Hargrave v. McKinney,* 413 F.2d 320, 324 (5th Cir. 1969), (on remand, *Hargrave v. Kirk,* 313 F. Supp. 944 [M.D. Fla. 1970], vacated on other grounds sub nom., *Askew v. Hargrave,* 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 [1971]), determined that the Texas school financing system involves a classification based upon "wealth." This classification, when affecting a "fundamental" interest, was held to require close judicial scrutiny of the financing system (337 F.Supp. 280, 282-283).

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as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only 'the unequal impediment placed on us by the state because we are "poor."' We consider this to be a fundamental distinction between the cases."

[22]Goldstein, App. A, pp. 48-49, n. 91.

[23]"Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth . . ." (337 F.Supp. at 281, n. 1.)

[24]*Harper v. Va. State Bd. of Elections; Douglas v. Calif.; Griffin v. Illinois, supra,* n. 18; *McDonald v. Bd. of Election Comm'rs.,* 394 U.S. 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969).

Apparently, the District Court found, as did *Serrano,* that the financing system classified *school districts* according to wealth, in that it permits "citizens of affluent districts to provide higher quality education for their children, while paying lower taxes, . . ." (337 F.Supp. 280, 285.)[25]

Professor Coons and associates freely concede that the "wealth" to which they refer in their simple formula is the wealth of school districts, and not the wealth of persons or families. They state:

> "We have noted at several points that, in the school finance issue, the poverty involved is always that of the district and only sometimes (though usually) that of the individual."[26]

Amici submit that the lower court's determination that the Texas financing system involved a suspect classification based upon "wealth" is incorrect because (a) the court erroneously relied upon the so-called "de facto wealth classification" cases decided by this Court,[27] (b) classification of school districts by wealth, if such a classification exists, does not constitute a

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[25]The District Court also noted an affidavit showing statistics concerning 110 of the State's 1,200 school districts and compared the median family incomes of families in the richest ten districts with those in the four poorest districts for the year 1960. Its conclusion that "those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income. . . ." (337 F.Sup. 282) is seriously questioned in Goldstein, App. A, pp. 33-34, wherein he notes that among the three groupings of the remaining 96 school districts the data even shows an inverse relationship between median family income and district tax base per pupil.

[26]Coons, et al., *Private Wealth and Public Education, supra,* p. 374.

[27]*Griffin v. Ill.,* 351 U.S. 12 (1956); *Douglas v. California,* 372 U.S. 353 (1963); *Harper v. State Bd. of Elections,* 383 U.S. 663 (1966).

classification of individuals by wealth, and (c) this Court has recently held that state legislation allegedly establishing a classification based upon wealth is not subject to close judicial scrutiny where the interest affected was housing or shelter.[28]

(a) The line of U.S. Supreme Court "de facto wealth classification" cases relied upon by the California Supreme Court in *Serrano* and the lower court in the instant case, all involved clear infringements of recognized fundamental *individual* interests. In *Harper v. Va. State Bd. of Elections,* 383 U.S. 663 (1966) the payment of a poll tax as a precondition to voting was invalidated because it conditioned an individual's right to vote on the payment of a fee. In *Griffin v. Illinois,* 351 U.S. 12 (1956) and *Douglas v. California,* 372 U.S. 353 (1963) states were precluded from requiring an indigent criminal defendant to pay for a transcript or an attorney for appeal, requirements which effectively barred such individuals from access to the full criminal judicial process.

That the Texas school financing legislation does not adversely affect an *individual's* interest in education, no matter how highly that interest is ranked, has previously been noted. Thus, it does not appear that any fundamental individual interest is affected by any wealth classification that is arguably embodied in the school financing scheme.

(b) Additionally, these cases all involved classifi-

[28] *James v. Valtierra,* 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331 (1971).

cations which precluded *individuals* from exercising their rights to vote or to invoke the criminal judicial processes. The lower court in the instant case, like *Serrano,* essentially found that the financing system classifies *districts* by wealth. Thus, the system, if it can be deemed to classify at all, classifies *districts* and not individuals in that manner.

Thus, the rich person living in a poor school district is disadvantaged at least as much as a poor person in the same district, with respect to the local taxes imposed upon his property to finance his children's education. Similarly, the poor person living in a rich school district is advantaged at least as much as a rich person in the same district with respect to the school district tax rate. Therefore, what the court below and the California Supreme Court focused upon is not a classification of individuals by wealth, but the lack of uniformity in the burdens on taxpayers in the various school districts, regardless of differences in their individual wealth. That the financing system does not classify individuals by wealth and does not condition the ability to provide educational dollars on individual wealth is apparent.

In this connection, it is pertinent that intrastate or interdistrict territorial uniformity has not been held to be required under the Equal Protection Clause (*Salsburg v. Maryland,* 346 U.S. 545, 551-52, 98 L.Ed. 281, 74 S.Ct. 280 [1953]), except in cases involving racial discrimination, (see, e.g., *Griffin v. County School Board,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.

2d 256 [1964]), or effective impairment of the right to vote (e.g., *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 [1964]). It is apparent that if equality in school district tax bases is constitutionally required, then tax base equality would also be required for all taxes imposed by local entities which provide such services as public welfare, health services, police and fire protection, sewers, streets, drains, lighting, libraries, hospitals, parks and playgrounds. Obviously, such a rule of law would completely destroy the manifest benefits derived from delegation of taxing powers to cities, counties, school districts and special districts, and effectively destroy local government.

(c) Also, even assuming, arguendo, that the school finance system does classify individuals or districts by wealth, this Court's decision in *James v. Valtierra, supra,* 402 U.S. 137, 28 L.Ed.2d 678, 91 S.Ct. 1331, precludes application of the close scrutiny test on that basis alone.[29] It is more than apparent that the high premium placed upon community participation in decisions which may lead to large expenditures of local governmental funds is present in the area of education to at least the same extent it is present in low income housing.[30] Any disadvantage to a particular group which may result from the operation of the school financing system is certainly balanced by the values of

[29]The presence of a wealth classification in *James* is vigorously argued by Justice Marshall in his dissent in that case. (28 L.Ed.2d at 684-685.) The absence of wealth classification in the school finance system is discussed above.

[30]The attempt of state legislatures and local school boards to tackle the problems of education in an ad hoc manner are discussed below, together with the particular desirability of this approach in the field of education.

local autonomy and control of local educational policies and decisions.[31]

3. Societal or governmental interests supporting or affected by the Texas school finance system.

The policy reflected in the Texas school financing system, like California's, is to permit a high degree of local control and responsibility over the administration of the state's public schools and over the amount of money to be expended locally for public school education, while at the same time assuring essential educational financing for all who attend public schools. The dollar amount per pupil raised for educational purposes within any school district, over and above the state contribution, rests within the sound discretion of the local school district governing board and the voters of that district. (Texas Education Code §§20.01, et seq.; California Education Code §§20800, et seq.)

Thus, the aspect of the financing system which is attacked by Appellees can be seen to embody a singular devotion to democratic values and precepts in the administration and control of education. The number and

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[31]As stated by Mr. Justice Black in his majority opinion in *James*, 402 U.S. 137, 142, 28 L.Ed.2d 678, 683, 91 S.Ct. 1331:

> "The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'" [Footnotes omitted.]

complexity of the variables attendant to the administration and control of a local school district, most of which involve financial considerations, render such local fiscal autonomy in education essential, if not compelling. The variables to be evaluated and accommodated by local boards and the state legislature include statewide variations in costs and salaries, the relative efficiency of school districts, and the need for local innovation and experimentation to accommodate local needs or desires. The high, indeed fundamental, value placed upon democratic processes which permit all of the people of the community to have a voice in public policy decisions which may lead to increased expenditures of local governmental funds is well settled, and has recently been reaffirmed by this Court, (*James v. Valtierra,* 402 U.S. 137, 28 L.Ed.2d 678, 682-683, 91 S.Ct. 1331 (1971).) Adoption of the equal protection standard and rule urged by Appellees and adopted by the court below can only diminish the values of the democratic processes in educational matters by undercutting the responsibility and concomitant local spirit and interest which flow from local autonomy and control of educational programs and the amount of money to be expended on those programs.[32]

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[32]It seems apparent that if the spirit of local responsibility is weakened or destroyed, it may be difficult to revive. In tracing the history of local control and responsibility for education, Gordon C. Lee, in An Introduction to Education in Modern America, Henry Holt & Co., New York (1954) "Education and 'Grass Roots' Democracy: The Administration of Education at the Local Level," ch. 12, p. 207, has stated:

> "The trend today is decidedly in the direction of school district consolidation. Improved transportation has meant that schools could serve larger areas; the resultant combination of erstwhile independent school districts has meant the availability of more adequate resources for school support. However, even this seemingly altogether desirable reform is

One of the geniuses of the public school systems in America has been the ability of local school districts, whose residents desired and whose funds permitted, to experiment and innovate in finding solutions to educational problems, many of which were of purely local concern and others which were of universal application. The progress and achievements of the public education systems in this country since its founding speak for themselves. The incentive and leadership behind much of this progress has been the high motivation and performance of individual school districts which have undertaken innovative practices and proven or disproven reasonable educational theories. The performance and motivation of such school districts has been of benefit to all school districts.[33] A constitutional rule which would result in a general leveling of educational expenditures would effectively destroy the spirit and motivation of such districts and would eliminate one element of stimulating leadership in education which has existed since the inception of our public education systems.

Another governmental or societal interest which is unquestionably affected by the school finance legisla-

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accompanied by certain very real problems. The intimacy and warmth often characteristic of the smaller school are all too frequently missing in the larger schools. The close contact between school and community, and the resultant high degree of public interest, are difficult to retain as the district is enlarged. All of which indicates that the movement towards consolidation can be carried too far, to the point where the real and vital benefits of genuinely local responsibility are lost."

Diminution of the responsibility of local fiscal control would have much the same effect on local spirit and interest in education as school district consolidation, because limitation of local fiscal options will inevitably reduce local responsibility to determine educational priorities and the distribution of educational dollars.

[33]Mort, P., et al., *Public School Finance* (3rd ed., New York 1960).

tion in question is the interest of the state in treating individually the multitude of problems in the area of education. This Court has held that, in the area of economics and social legislation, a state may "address a problem 'one step at a time, or even select one phase of one field and apply a remedy there, neglecting the others.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488, 99 L.Ed. 563, 572, 75 S.Ct. 461." *Dandridge v. Williams,* 397 U.S. 471, 484, 25 L.Ed.2d 491, 501, 90 S.Ct. 1153. See also *Jefferson v. Hackney,* 405 U.S. ....., 32 L.Ed.2d 285, 92 S.Ct. 1724.

The California Legislature, for example, has devoted considerable attention in recent years to special educational problems in such areas as programs for the physically handicapped, the mentally retarded, the educationally handicapped and for children with working parents. These programs have all involved categorical "excess-cost" state funding which the local districts may augment. Thus, it can be seen that the Legislature has been tackling the myriad problems in education on an individualized basis, problem by problem. The adoption of the constitutional rule urged by Appellees and adopted by the court below in this case would seriously jeopardize the efforts of state legislatures and local boards to tackle these particularized educational problems in such a manner.[84]

A further interest of society, and an individual in-

[84] The intent of the California Legislature to provide for local control and responsibility through the present financing system is set forth in its statement of purposes of the Foundation Program. See California Ed. Code §17300, pp. 44-47, infra.

terest of parents, which would be affected by affirmance of the rule adopted by the court below has recently been recognized and reaffirmed by this Court. This is the interest of the parent in being able to control his child's education and upbringing. The interest of the state in requiring universal compulsory public education has twice been held to yield to the interest of the parent in determining where and by whom his child should be educated and attempting to achieve the best education he can for his child. (*Pierce v. Society of Sisters,* 268 U.S. 510, 269 L.Ed. 1070, 45 S.Ct. 571 (1925); *Wisconsin v. Yoder,* 405 U.S. ....., 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972).) The constitutional rule urged by plaintiffs and adopted by the lower court, would effectively limit the opportunities within the public school system of a parent who desired to pay more for his child's education or to have an effective voice in the determination of the amount of funds to be expended on educational programs within his local school district.

4. Consequence of frustrating legislative and congressional attempts to promote educational opportunities.

In addition to the foregoing factors to be considered in determining the standard of review to be applied, we submit that it is highly relevant to consider the consequences which would flow from the standard of review adopted.

Thus, full consideraton should be given, in this case, to the impact upon the school financing system of imposing a constitutional "straitjacket" of close judicial scrutiny on legislative and congressional attempts to promote educational opportunities. Our concepts of educational services to be provided are by no means static; they are in this modern area undergoing revolutionary changes.[35]

There is room here for only two of numerous possibile examples. (For other examples of innovation, see those programs described in Footnote 40, infra, and on page 60 of text.) The State Superintendent of Public Instruction of the State of California is presently urging that the California Legislature adopt Senate Bill 1302 (Appendix C) which would provide "Early Childhood Education Programs," which would launch many pupils on their educational voyages at the age of three years and nine months. In an interview reported in a legal newspaper, The Los Angeles Daily

[35]See R. Butts & L. Cremin, *A History of Education in American Culture* (1953) L. Cremin, *The Transformation of the School* (1961), both cited in *Wisconsin v. Yoder*, 405 U.S. ....., 32 L.Ed.2d 15, 26, 92 S.Ct. 1526.

Journal, July 4, 1972, Superintendent Riles is quoted as follows:

> "Q. How are you planning to solve the problem of California's falling test scores?
>
> "A. One thing is our proposed early childhood program.
>
> "The essence of the program is to find out how to change the elementary grades to make sure the children are excited.
>
> "We'll try to individualize the programs. What you're talking about here is children with problems with language, or low-income children—any number of things, including the problems of gifted children. When you individualize his work, you give him the kind of work that will challenge him.
>
> "Another thing we're aiming at is to assure that every student will have one salable skill at the end of high school. We've had task forces on these things since early 1971."

The other example of striking educational innovation in-process is that of "career education." The official journal of the California School Boards Association, after describing U.S. Commissioner of Education, Sidney P. Marland, as "an outspoken advocate of reform in vocational education, states:

> "* * * He has announced that such reform will be one of a very few major priority areas for the Office of Education. Under his leadership, the federal government is financing research, leadership training, and exemplary programs, many of which, incidentally, are located in California.

"'Career education' is what Marland calls his proposal. What is career education anyway? Is it a fancier name for that rather shopworn commodity traditionally known as 'vocational training'? Emphatically not, according to Marland, who deplores the widespread tendency to divide curriculum and students into three traditional categories: college preparatory, vocational training, and general education. Career education would be a whole new scene; it would involve *every* student, regardless of academic ambition, and it would extend throughout a student's entire schooling, from kindergarten on. Instead of limited specific skills training, which has characterized so much of vocational education, it would introduce students to a more flexible and open-ended grouping skills.

"These skills are the fifteen occupational clusters illustrated in Figure 1 and identified in Figure 2. Each cluster has a whole range of occupational options, each of which offers a number of entry levels requiring varying degrees of skills and/or training. For example, in the health cluster there are such possibilities as accident prevention, pharmacology, medical and dental sciences, to name a few, and each of these areas may be entered from different stages of formal preparation. Open entry and exit from school to work and back again are important aspects of Marland's concept; persons are to be encouraged to check in and out of educational programs throughout their lives to upgrade their skills in a particular field or to retrain themselves for an entirely new career. Such career flexibility is crucial in a society as complex and technological as ours, as we have been pain-

fully learning in the past few years." ("California School Boards," July/August 1972, pp. 7-8.)

Thus, not only the techniques but basic concepts of education are in the process of rapid innovative changes. To subject to the "necessary to a compelling state interest" test legislative efforts to inaugurate such innovative programs in selected or less-than-all school districts of the state would, at best, stifle such efforts, and at worst, condemn them.

5. The ability of the courts to fashion and enforce fair and appropriate remedies.

As previously noted, to apply the "necessary to promote a compelling state interest" test to legislation is virtually to condemn that legislation. It thus becomes important to consider, among all the relevant factors in determining the proper standard of review, the ability of the courts to fashion and enforce fair and appropriate remedies with respect to the statutory provisions which would probably be invalidated under that standard of review.

Since amici are treating separately the question of the ability of the courts to fashion and enforce remedies with respect to the vastly complex and intricately interwoven legislation making up the Texas system of financing its public schools, we refer to Point III for the substance of these considerations which should be weighed by the courts as one of the factors in determining the standard of review to be applied here.

The lack of faith in the democratic electoral process demonstrated by the plaintiffs who initiate attacks such as this upon comprehensive school financing programs should not be shared by the courts. Professor Coons and his associates, in their blueprint for litigation attacking school financing systems such as this, consider and give short shrift to the feasibility of achieving their ends through established democratic processes.[36] This high Court on the other hand has expressed its great faith in the democratic electoral processes and has evidenced extreme solicitude for protection of the rights of people to vote, and for the right of voters to see that their votes are not diluted by means of any form of invidious discrimination, including discrimination on the basis of the individual's ability or even willingness to pay.[37]

D. Conclusion.

For the foregoing reasons it is respectfully submitted that this Court should consider all relevant factors and reasons in determining the highly important question of the standard of review to be applied to the complex system of laws whereby the State of Texas finances its public schools. We submit that a careful analysis of the alleged classification involved (wealth), the individual and societal or governmental interest involved (public education), the interrelationships be-

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[36]Coons, et al., *Private Wealth and Public Education*, Belknap Press of Harvard University Press (1970) pp. 287-289.

[37]*James v. Valtierra*, 402 U.S. 137 (1971); Bullock v. Carter, ... U.S. ....., 31 L.Ed.2d 92 (1972).

tween each basis for determining that the legislative classification is "suspect" and each basis for determining that the interests affected are "fundamental," the consequences for public education of applying a strict standard of judicial review, and the abilities of the courts to fashion and enforce fair and appropriate remedies, must lead inexorably to the conclusion that something less than the onerous "necessary to promote a compelling state interest" test be applied.

II

THE TEXAS SCHOOL FINANCING SYSTEM IS VALID UNDER ANY FAIRLY APPLICABLE STANDARD OF REVIEW.

The provision, administration and control of public education is undoubtedly one of the most complex, if not the most complex, set of problems of state and local governments, and increasingly, of the Congress of the United States.

In attempting to ascertain and accommodate the multitudinous and varying educational needs and desires of the people in the different regions and localities, the people of Texas, like the people of California, have devised a system of school financing which is designed to assure essential educational programs and opportunities to each child attending public schools within the state, while at the same time providing for and permitting a high degree of local control and responsibility over the administration of local schools

and over the amount of money to be raised and expended locally for educational programs.[38]

The desires of the people of California to assure essential educational programs and opportunities uniformly to all pupils and to assure local control of programs and expenditures is clearly reflected in the following legislative statement of principles and purposes of the Foundation Program:

> "It is the intent of the Legislature that the administration of the laws governing the financial support of the public school system in this State be conducted within the purview of the following principles and policies:
>
> "The system of public school support should be designed to strengthen and encourage local responsibility for control of public education. Local school districts should be so organized that they can facilitate the provision of full educational opportunities for all who attend the public schools. Local control is best accomplished by the development of strong, vigorous, and properly organized local school administrative units. It is the State's responsibility to create or facilitate the creation of local school districts of sufficient size to properly discharge local responsibilities and to spend the tax dollar effectively.
>
> "Effective local control requires that all local administrative units contribute to the support of school budgets in proportion to their respective abilities, and that all have such flexibility in their

[38]Texas Education Code §§16.01, et seq. and 20.01, et seq., California Education Code §§17651, et seq. and 20800, et seq.

taxing programs as will readily permit of progress in the improvement of the educational program. Effective local control requires a local taxing power, and a local tax base which is not unduly restricted or overburdened.

"The system of public school support should assure that state, local, and other funds are adequate for the support of a realistic foundation program. It is unrealistic and unfair to the less wealthy districts to provide for only a part of the financing necessary for an adequate educational program.

"The system of public school support should permit and encourage local school districts to provide and support improved district organization and educational programs. The system of public school support should prohibit the introduction of undesirable organization and educational practices, and should discourage any such practices now in effect. Improvement of programs in particular districts is in the interests of the State as a whole as well as of the people in individual districts, since the excellence of the programs in some districts will tend to bring about program improvement in other districts.

"The system of public school support should make provision for the apportionment of state funds to local school districts on a strictly objective basis that can be computed as well by the local districts as by the State. The principle of local responsibility requires that the granting of discretionary powers to state officials over the distribution of state aid and the granting to these officials of the power to impose undue restriction

on the use of funds and the conduct of educational programs at the local level be avoided.

"The system of public school support should effect a partnership between the State, the county and the local district, with each participating equitably in accordance with its relative ability. The respective abilities should be combined to provide a financial plan between the State and the local agencies known as the foundation program for public school support. Toward this foundation program, each county and district, through a uniform method should contribute in accordance with its true financial ability.

"The system of public school support should provide, through the foundation program, for essential educational opportunities for all who attend the public schools. Provision should be made in the foundation program for adequate financing of all educational services.

"The broader based taxing power of the State should be utilized to raise the level of financial support in the properly organized but financially weak districts of the State, thus contributing greatly to the equalization of educational opportunity for the students residing therein. It should also be used to provide a minimum amount of guaranteed support to all districts, for such state assistance serves to develop among all districts a sense of responsibility to the entire system of public education in the State. State assistance to all districts also would create a tax leeway for the exercise of local initiative." (California Education Code §17300.)

Thus, it can seen that the California Legislature has attempted to accommodate, through the Foundation Program, both the compelling interest of children in receiving essential educational opportunities and the compelling interests of parents in directing and controlling the education and upbringing of their children.

Just as the problems of the poor are complex, and states are given great leeway in discharging their "difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients,"[39] so the problems of all groups and individuals in education are even more complex, and state legislatures and local school boards should be allowed to adjust and solve the variant problems and allocate the limited funds for public education in the most democratic manner possible in order to accommodate local needs and desires for education services.

The problems of the poor in education are only one of the legion of educational problems faced by the legislature on a continuing basis. California, like Texas and other states, has specifically attacked the problems of poor and disadvantaged by providing compensatory education programs, which include special state funding.[40] Additionally, the people of California have as-

[39] *Jefferson v. Hackney*. 405 U.S. ....., ..., 32 L.Ed. 285, 299, 92 S.Ct. 1724 (1972).

[40] These programs include: crash programs in reading and mathematics—California Education Code §§6490-6498, special programs for mentally gifted minors from disadvantaged areas—§§6421-6434, and pre-school follow through programs—§§6499-6499.9; see generally, California Education Code §§6450, et seq.

sured essential levels of education to all children with other or additional specific educational problems.[41] A constitutional rule which would require a general leveling of educational expenditures, such as the rule adopted by the court below and the California Supreme Court in *Serrano v Priest, supra,* would undoubtedly infringe upon the abilities of the legislature and local school boards to accommodate the varied interests and needs of children and their parents in these special problem areas.[42]

Additionally, it should be pointed out that the Texas Legislature, in attempting to satisfy the compelling interest of the state in assuring essential educational programs for all children on a uniform basis, has taken into account the disparities in tax bases among the districts and attempted to equalize any concomitant variances in local abilities to support the foundation program and other programs by use of the "economic

[41]e.g., Programs for educationally handicapped minors, California Education Code §§6750-6753; mentally handicapped minors, §§6870-6874.6, 6920; mentally retarded minors, §§6901-6920; neurologically handicapped minors, §§26401-26404; orthopedically handicapped minors, §§894-894.4; physically handicapped minors, §§6801-6822; and vocational training and rehabilitation services, §§7001-7028. All these programs include special state funding while allowing local participation in the discretion of local school boards, dependent upon local needs and desires for such programs.

[42]For example, it is doubtful whether under the *Serrano-Rodriguez* rule, a local district with special needs and desires for deaf and hard-of-hearing classes could raise and expend, from local sources, whatever funds it felt were necessary or desirable to supplement basic state apportionments allowed for such classes. If such supplementation is not constitutionally permissible, the compelling interests of some parents in directing and controlling their children's education would be thwarted. If it is permissible, the rule makes no sense in that the citizens of one locality, whether due to differing desires or abilities to pay, or both, would be allowed to provide for higher expenditures (and under the assumption of the rule, a higher quality of education) in a particular educational area, to the disadvantage of the child with the same needs in a district where the school board does not choose to provide or supplement such a program.

index" (Texas Education Code §§16.74-16.78). California has similarly attempted to equalize any such disparities through equalization aid (California Education Code §§17901, 17902) and supplementary aid (§§17920-17926) to districts with lower property valuations.

In view of the apparent absence of a correlation between educational expenditures and educational outputs or the quality of education afforded,[43] the interests of the state in preserving its foundation program formulas and local district options would appear to be all the more compelling. The absence of evidence of such a correlation additionally increases the desirability of giving state legislatures and local school boards great leeyway in determining the formulas for allocation of educational funds, since those bodies are uniquely equipped to respond to the varying educational needs and their concomitant financing requirements on a continuing basis.[44]

The compelling interest of parents in directing and controlling the education and upbringing of their children has been recognized and recently reaffirmed by this Court. (*Pierce v. Sociey of Sisters, supra* (1925); *Wisconsin v. Yoder, supra* (1972).) The reality that pupils and parents in varying localities[45] have differing educational needs and desires strongly militates toward preservation of local control over local educa-

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[43]See notes 14 and 15 and accompanying text.

[44]See Argument III, infra.

[45]And within a sprawling urban-suburban area such as Los Angeles County.

tional programs and their concomitant fiscal allocations. The purpose reflected in the present financing system to permit the citizens of local districts to raise additional tax funds and expend them within the district for whatever government services they determine are needed has been wisely preserved and protected.[46] Allocation and expenditure of funds on educational programs, depending on the complex and varying needs and desires of parents and their children, including their needs or preferences for other governmental services, is largely a problem of parental choice.[47]

This interest of parents was also recognized by Mr. Justice Stewart in his majority opinion in *Wright v. Council of the City of Emporia,* 40 Law Week 4806, 4812:

> "Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society, . . . "

In that case, the City of Emporia's attempt to form a new and separate school system was found to be unacceptable not because creation of a separate system would result in a disparity in a racial balance between the city and county schools, but because the timing of the attempt indicated a clearly racial motive to impede the dismantling of a duel school system, pursuant to court order, under a plan which entities representing

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[46]See *General Am. Tank Car Corp. v. Day,* 270 U.S. 367, 70 L.Ed. 635, 46 S.Ct. 234 (1926); *Hess v. Mullaney* (9th Cir. 1954), 213 F.2d 635, cert. den. sub nom. *Hess v. Dewey* (1954), 348 U.S. 836, 99 L.Ed. 659, 75 S.Ct. 50; *Board of Ed. of Ind. Sch. Dist., 20, Muskogee v. State of Oklahoma,* 409 F.2d 665, 668 (10th Cir. 1969).

[47]Brest, Book Review, 23 Stanford L.Rev. 591, 596, 611-12 (1971).

two-thirds of the students affected had apparently accepted.[48] The Court recognized that absent such prohibited racial intent, the attempt to create a new school system would be acceptable.

> "Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without such an adverse effect upon the students remaining in the county, . . ." 40 Law Week at 4812.

In the instant case, the school finance system quite clearly does not reflect such an invidious motive, either on its face or as applied. Therefore, the values of parental choice in allocation and expenditure of educational funds would appear to be all the more compelling, and the finance system, inasmuch as it preserves and promotes such parental choice, certainly withstands constitutional scrutiny.

In its statement of principles and purposes of the Foundation Program, the California Legislature expressly recognized one of the paramount state interests reflected in the present financing systems, which was wholly ignored by the court below and the California Supreme Court in *Serrano v. Priest, supra*:

> "The system of public school support should permit and encourage local school districts to provide and support improved district organization and educational programs . . . . Improvement of programs in particular districts is in the interests

[48] 40 Law Week at 4811-4812.

of the State as a whole as well as of the people in individual districts, since the excellence of programs in some districts will tend to bring about program improvement in other districts." (California Education Code §17300.)

It has long been recognized that much of the remarkable progress and achievements of the American public school systems has resulted from the incentive and leadership of individual school districts which have undertaken innovative educational programs and, in the course of so doing, have proven or disproven reasonable educational theories. The opportunities for the people of a local school district to choose to establish and finance innovative programs are expressly promoted by the present financing systems.[49]

More basic, however, is the interest of the state, through the financing system, to permit districts with peculiar educational problems to accommodate the needs and desires of their students and parents in a democratic manner. School districts in urban areas must accommodate special educational needs which may not be a factor in suburban or rural districts. Some rural districts, likewise, must accommodate certain educational needs not prevalent in urban or suburban districts.

The State Legislatures of Texas and California have wisely recognized, in establishing and maintaining the present financing systems, that the people within

[49]Mort, P., et al. *Public School Finance*, 3rd Ed. (New York 1960) pp. 207, 213.

local school districts are uniquely equipped to consider the various factors involved in determining what educational programs are necessary and desirable for their particular district and in determining the level of expenditures for such programs. These various factors include:

1. The costs of continuing contractual commitments for educational services, such as teachers' salaries, which may vary widely from district to district.
2. The costs of other necessary and desired governmental services, such as police and fire protection, health and sanitation services, and other municipal services such as streets, drains and lighting.
3. The availability of federal funds for educational programs, which may relieve the pressures to allocate local funds to certain desirable educational programs.[50]
4. The interests of parents and students in continuity of educational programs within the district.
5. The shifting nature and composition of the district population and any concomitant changes

[50] The impact of federal funds on the abilities of local parents and taxpayers to choose the levels of support for educational programs they desire to provide was totally ignored by the court below and by the California Supreme Court in *Serrano v. Priest*. Both courts focused heavily upon tax rates and district expenditures and assessed valuations per pupil. This data, to be realistic, should include all federal funds distributed to the school districts in any consideration of disparities in school financing and expenditures. To do otherwise would be to require the state legislatures and local school boards to ignore the various federally-funded educational programs in all decisions concerning the level of funding for particular educational programs, a requirement which is obviously irrational. Additionally, large, tax-exempt property holdings within a particular district, such as church and government holdings, may significantly affect such data.

in their educational needs and desires. Large districts such as Los Angeles, for example, are experiencing significant changes due to redevelopment, resulting in increased assessed valuations, and a decline in pupil population.

6. The impact of private school attendance within the district, which affects the amount of state and local funds allocable per pupil and the incentive of many district residents to supplement the level of funding of public school educational programs.

These factors, in addition to innumerable others, must be considered and adjusted on a continuing basis by the state legislature and local school boards. The complex problems of education, on both a statewide level and even within a particular school district, can and do change rapidly. Any combination of factors, such as those noted above, may, in the best judgment of the people of a state or a local school district, call for the adoption of programs or procedures which operate to the disadvantage of some particular group or groups within the state or district. It will almost always be true that the state or the local school district could accomplish its particular goals and purposes by some other program or procedure which would be less onerous to the disadvantaged group. However, in the area of education, the problems are numerous and complex, and the populations of many districts contain many diverse and shifting groups. Under such circumstances, the Texas and California Legislature's deci-

sions to allow local choice in the adjustment and accommodation of these problems and groups is more than merely reasonable, it is compelling.

To require state and local legislative bodies, in all decisions concerning the adjustment and accommodation of educational problems, including funding, to determine and choose the least onerous means as to the interest of each group which may potentially be disadvantaged, is to require the unreasonable, if not the impossible. As Mr. Justice Black noted in his majority opinion in *James v. Valtierra,* upholding local referendum procedures for approval of low-income housing:

> "Under any such holding [requiring the State to choose the least onerous method of accomplishing its purposes if a particular group is disadvantaged by a state legislative scheme], presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." (*James v. Valtierra, supra,* 402 U.S. 137, 142, 28 L.Ed.2d 678, 683, 91 S.Ct. 1331.)

It is obvious that such a holding applied to the school finance system in the instant case would require the Court to analyze the governmental structures and procedures of state and local school districts concern-

ing all aspects of educational decision-making, a task for which courts are clearly ill-suited.

The lower courts in *McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968) aff'd sub nom, *McInnis v. Ogilvie,* 394 U.S. 322, 333 (1969) and *Burruss v. Wilkerson,* 310 F.Supp. 572, 574 (W.D. Va. 1969) aff'd 397 U.S. 44 (1970) both recognized the complexity of legislative decision-making in the field of education and educational finance. As the lower court in *McInnis* stated, quoting from *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70, 57 L.Ed. 730 (1913):

> " 'The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific . . . . Mere errors of government are not subject to our judicial review.' " (293 F.Supp. at 333.)

A careful analysis of the complexities involved in legislative decision-making in the field of education clearly indicates that the decisions of Texas and California to permit local choice while assuring essential programs and levels of support on a uniform basis is neither illogical nor unscientific. Rather, it represents a devotion to democracy and a historical and common sense recognition that decisions concerning distribution of governmental services in such a complex and changing area should be made at the local level in the most democratic manner possible. To hold that the mere involvement of the state in the provision of such governmental services requires that all such services

must be distributed equally or in a manner devoid of aspects of localized pricing mechanisms would inevitably require wholesale restructuring of all governmental institutions.[51]

Indeed, all of the arguments made by plaintiffs in the instant case, including those concerning the applicable standard of equal protection review, the alleged availability of less onerous alternatives, and the alleged availability of judicially manageable standards were presented to this Court in the jurisdictional statements and various amici briefs filed in the *McInnis* and *Burruss* cases. By its summary affirmance in those cases, this Court rejected plaintiffs' contentions, wisely recognizing the complexity of educational finance legislation and the desirability of permitting local choice in such matters. This Court has consistently afforded state legislatures special freedom in the area of taxation classifications.

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution

[51] Brest, Book Review, 23 Stanford L.Rev. 591, 599-600 (1971).

of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." [Footnotes omitted; *Madden v. Kentucky,* 309 U.S. 83, 87-88, 84 L.Ed. 590, 593 (1939).]

The constitutional rule urged by plaintiffs and appellees herein and adopted by the court below and by the California Supreme Court in *Serrano v. Priest,* can only result in an irrational upward or downward leveling of educational expenditures resulting in increased tax burdens and artificial uniformity in educational programs. The compelling wisdom of permitting local choice in the adjustment of complex educational problems must necessarily be ignored if such a constitutional rule is to become the law of this land.

III

THE MONUMENTAL TASK OF MORE FAIRLY ALLOCATING FINANCIAL RESOURCES TO SCHOOL DISTRICTS IS PROPERLY A FUNCTION TO BE EXERCISED BY THE STATE LEGISLATURE AND THE CONGRESS, AND NOT BY THE COURTS.

The exceedingly intricate and complex problems which would be faced by the courts were they to take unto themselves the Herculean task of more fairly allocating a state's available financial resources among its school districts, requires the conclusion that the courts should leave these problems in the hands of those equipped to deal with them: the State Legislatures, Governors, school boards, the United States Congress and the President.

A brief summary of the difficulties involved should suffice to demonstrate that the courts are not equipped to deal with these problems.

Differences in Status Quo

How would the courts alleviate the consequences of presently existing differences in situations among the various school districts of a single state? Take, for example, the consequences of some districts having old buildings requiring repair or replacement, with inadequate playgrounds, as compared with districts having new buildings with adequate playgrounds. What about the same differences within the same school district, such as the large Los Angeles Unified School District

with old buildings in the central core and new buildings near its perimeter resulting from newcomers settling farther and farther from the central city? What about differences in the levels of bonded indebtedness among the districts, the differences in existing contractual commitments, salary schedules, commitments made by school staff in reliance on such salary schedules, differences among districts in average salaries because of differences of positions on graduated salary schedules, and differences in programs among districts, such as adult education, vocational education, lunch programs, and culturally disadvantaged programs? Are the courts in fact equipped to equitably alleviate the consequences of such differences in the present situations of the numerous school districts of a state?

Allowing for Differences in Educational Needs

Are the courts equipped to make equitable allowances for the differences in educational needs of the pupils of a state? Plaintiffs concede that such differences exist, but contend that their simple formula permits making appropriate allowances therefor. However, they fail to point out how the courts are equipped to equitably deal with them. Surely, the state legislatures and the Congress are far better equipped to deal with these problems than are the courts. We note the following examples of particular educational programs adopted in California which indicate legislative attempts to deal with special problems of pupils on an individual basis. For culturally disadvantaged minors, the California Legislature has adopted:

(1) Crash programs in reading and mathematics (California Education Code [hereinafter Ed. C.] §§ 6490-6498).

(2) Special programs for mentally gifted minors from disadvantaged areas (Ed.C. §§6421-6434).

(3) Pre-school follow-through programs (Ed.C. §§6499-6499.9).

Other special programs adopted by the California Legislature include:

(1) Educationally handicapped minors (Ed.C. §§6750-6753).

(2) Mentally handicapped minors (Ed.C. §§6870-6874.6, 6920).

(3) Mentally retarded minors (Ed.C. §§6901-6920).

(4) Neurologically handicapped minors (Ed.C. §§26401-26404).

(5) Orthopedically handicapped minors (Ed.C. §§ 894-894.4)

(6) Physically handicapped minors (Ed.C. §§6801-6822).

(7) Vocational training and rehabilitation services (Ed.C. §§7001-7028).

Even if it is granted that the courts, like the Legislature, may make appropriate allowances for such programs, on what basis would the courts, from year to year, determine *how much* allowance should be made

for each such program, where such programs should be located and what differential should be allowed to account for differences in costs, etc. arising by reason of their location in remote rural areas as compared with urban or suburban areas?

Allowing for Differences in Costs

Are the courts in fact equipped to allow for differences in prevailing salaries in the various geographical areas of the state, for differences in costs of land acquisition and construction of buildings, for differences in the efficiencies among school districts, because of differences in size or other factors, in such matters as administration, supervision, and purchasing?

Allowing for Federal Grants and Private Gifts

Are the courts equipped to make appropriate allowances for funds available to school districts through Federal grants and private gifts? The court below noted "a series of decisions prohibiting deductions from state aid to districts receiving 'impacted area' aid." (337 F.Supp. 280, 285.) And, how would the courts allow for differences among school districts in amounts received by way of private gift?

Allowing for Differential Services Rendered by State and Intermediate Educational Units

How would the courts make appropriate allowances in allocating funds among the districts for differences from county to county and from district to district in the amount of services rendered by such intermediate governmental units as the Office of the County Superintendent of Schools in California?

The California Legislature has provided that the County Superintendent of Schools may, and in many instances must, provide various services implementing those provided by school districts. These include special education program coordination, supervision of instruction, attendance and health services, provision of guidance, library, and audio-visual services, and provision of programs for education of the physically handicapped and mentally retarded (Ed.C. §§885-896).

The State Department of Education of California is authorized to engage in various programs and projects, some of which are to be on a pilot project basis, in order to carry out the declared legislative intent "to foster innovation and creative change in education, based on research and proven need" and to "join together the United States Office of Education, the State of California, and local school system to bring purposeful change and experimentation to schools throughout the state, through the use of all available resources of the state." (Ed.C. §575) The scope of the activity authorized by the Legislature to be performed at the

state level may be indicated by the following articles of the California Education Code, contained in Chapter 6 entitled:

"ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AND EDUCATIONAL RESEARCH

Article		Section
1.	General Provisions	575
2.	Educational Innovation Advisory Commission	576
3.	Special Educational Projects	589
4.	Supplementary Educational Centers	590
5.	Experimental, Demonstration, and Operational Projects	591
6.	Evaluation of Projects	592
7.	Incentive Grants	593"

Allowing For Innovation on "Pilot Project" Basis

How are the courts to make appropriate provision for innovation of new educational programs, where there is a need for testing the efficacy of these programs before it is feasible to launch them in all school districts of the state? Would the courts be acting within the proper sphere of their functions were they to institute such innovative programs on pilot bases? See Senate Bill 1302 attached hereto as Appendix C providing for the innovative "Early Childhood Educational Program" to show the extreme complexities in which the Legislature must become involved in order to pro-

vide for an innovative program, and the requirement or ability to tap vast sums of public funds in order to fund such a program. If this is too much for the courts to accomplish, and if under the court's order the Legislature may not provide for innovative programs, does not the court order deprive the school districts of the state, and by extension the nation, of the benefits to be derived from learning the results and operating technique of such programs?

The plaintiffs have placed the courts in a dilemma. The more simple the rule which might be adopted by the court, the less it would provide for alleviation of the consequences of the wide variety of differences in the educational needs and desires of the millions of students to be affected, and of the consequences of differences in local situations. To adopt a simple rule would be to cast the children of a state from a single mold leading us to fulfillment of the dire predictions in Orwell's "1984."

The more complex the rule, to make provision for alleviation of the consequences of such differences, is to place an impossible on-going task upon the courts—a task with which the state legislatures, the Congress, and the various executive and administrative agencies created by them, are continuing to grapple, using vast sums of money in support of those efforts.[52] For example, are the courts prepared to fashion remedies which

[52]The National Education Finance Project initiated by the United States Office of Education in 1968 resulting in the oft-quoted publications of which "Alternative Programs for Financing Education" Vol. 5 is but one. was funded for approximately $2,000,000. *Id.* p. vii.

even remotely approach the complexities of A.B. 1283 (Appendix B) presently pending before the California Legislature in apparent response to the *Serrano* decision?

The problems involved here are well illustrated by the order of the District Court below, in which the Court simply restrains the defendants from giving any effect to the existing financing laws of the State of Texas "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the state as a whole" and orders them to "reallocate the funds available for financial support of the school system * * * in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions." The Court stayed its order for a period of two years "in order to afford the defendant and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law." (337 F.Supp. 280, 286.)

If the Legislature should fail to comply within that period of time, the question arises, how would the court itself fashion and enforce a remedy which would comply with the rule embodied in the order, while at the same time "equalizing educational opportunities" by taking into account, not all of the considerations noted above, but simply the most important of those considerations? How would the court see to it that the funds required to implement its ultimate order are made available? How would the courts manage to ac-

complish this each fiscal year in an era of rapidly changing educational concepts? The problems of providing educational funds are inextricably intertwined with the problems of raising the necessary funds through taxation.[58]

It must be recognized that the problems faced here are far more difficult that those involved in the reapportionment and desegregation cases—those problems are mere "child's play" by comparison.

The courts are not the proper forums in which to hammer out solutions to these intricate problems. As pointed out by Professor Kurland:

> "When Edward H. Levi, in his talk at the dedication of the new Earl Warren Legal Center at Berkeley, mentioned the problem with which we are concerned here, he said that the proper forum for finding a solution was not a conference but a research center. He was, of course, right, that conferences do not supply solutions for such basic problems. But the same reason that makes it unlikely that a conference will provide solutions makes it unlikely, even Mr. Levi to the contrary notwithstanding, the judiciary is going to afford an answer. And my third point of difficulty with the suggested constitutional doctrine of equality of educational opportunity is that the Supreme Court is the wrong forum for providing a solution. But I must warn you against my personal bias. Mr. Levi finds the 'accomplishment [of the Su-

[58]The "power equalizing" concept offered by Coons by way of token concession to the concept of local decision-making demonstrates plaintiffs' acknowledgment of the close relationship between allocating educational funds and problems of taxation. J. Coons, W. Clune & Sugarman, "Private Wealth and Public Education," pp. 14-15 (1970).

> preme Court . . . awesome.' I find it awful. But even he conceded 'that many of the decisions point directions for work which cannot be accomplished by the Court itself.' Let me suggest some reasons why I think this would be one of the problems that the Court should leave to others—at least for some time longer—to bring to solution.'"[54]

Professor Kurland goes on to point out that "the ingredients for success of any fundamental decision based on the equal protection clause are three, at least two of which must be present each time for the Court's will to prevail beyond its effect on the immediate parties to the lawsuit. The first requirement is that the constitutional standard be a simple one. The second is that the judiciary have adequate control over the means of effectuating enforcement. The third is that the public acquiesce—there is no need for agreement, simply the absence of opposition—in the principle and its application.'"[55]

Professor Kurland appears to concede that the rule urged by Professor Coons and adopted by *Serrano* and the District Court below, is a simple one, thus satisfying the first of his three requirements. Although amici agree that in its formulation, the rule is simple enough, we submit that its apparent simplicity is highly misleading. The first term in the formula, "the quality of public education," is itself so complex as to have

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[54]Kurland, "Equal Educational Opportunity: The Limits of Constiututional Jurisprudence Undefined," 35 Univ. of Chicago L. Rev. 583, 592 (1968). (Footnotes omitted.)

[55]Kurland, *supra*, footnote 54, p. 592.

defied the best efforts of professional educators to the present day and for the foreseeable future. Plaintiffs persuaded the *Serrano* court and the District Court below that they had avoided the pitfall of "lack of judicially manageable standards" by transforming their original demand that the courts enforce "equality of educational opportunities" into the formula "the quality of public education shall not be a function of wealth other than the wealth of the State as a whole." But, it is patently evident that they have not avoided that pitfall since they utilized in their new formulation the initial term "quality of public education" rather than some term such as "expenditures per pupil." Plaintiffs' formulation does not embody the simple rule "one scholar, one dollar," inasmuch as they acknowledge and allege that different students have different educational needs requiring differential expenditures. Plaintiffs are still asking the courts to oversee "the quality of education," not merely to equalize expenditures per pupil, and in doing so, they ask the courts to perform the impossible, as was recognized in *McInnis v. Shapiro,* 293 F.Supp. 327 (N.D. Ill. 1968)[56] and *Burruss v. Wilkerson,* 310 F.Supp. 572 (W.D. Va. 1969).[57]

In further response to Professor Levi's statement that the proper forum for finding a solution to these problems is not a conference but a research center, amici suggest that indeed extensive on-going research

[56]Aff'd, sub nom. *McInnis v. Ogilvie,* 394 U.S. 322 (1969).
[57]Aff'd 397 U.S. 44 (1970).

is required in the vital field of providing quality educational opportunities to the children of the state, and that such research should be conducted in an atmosphere involving well intentioned educational and fiscal experts working together toward common goals, rather than vying with each other in adversary court proceedings.[88]

An adverse consequence of the courts themselves undertaking the resolution of these problems of staggering magnitude would be the absolving of the state legislatures and Congress of this responsibility with the further consequence that the vast resources available to those legislatives bodies would not be utilized.

A further adverse consequence, should the Congress and the legislatures nevertheless continue to exercise responsibility, would be the extreme uncertainty of the constitutional validity of each of their laws and regulations were the "necessary to promote a compelling state interest" test be made applicable thereto by this high Court.

Although it may be imagined that a well-intentioned mastermind with powerful computers at his disposal and the power of the state behind him could solve the problems of public education in a more equi-

[88]Logically all other governmental services, with perhaps the exception of certain minor ones, would be subject to the *Serrano* rule. If the courts are to involve themselves in all these multitudinous problems assuring themselves that the quality of such governmental services are not to be a function of wealth other than the wealth of the State as a whole, the courts would be undertaking to themselves the impossible burdens of running the State and local governments, and would thereby be failing to give appropriate deference to the democratic ideas upon which this nation is founded and to the social values involved in the striving of communities for excellence and individualism.

table manner than the legislatures and the Congress have heretofore done, utilizing such means would not comport with the genius of this nation—democracy, nor with our concepts of the rights of our people to pursue individualism[59] and excellence.[60]

Professor Coons and associates, after outlining five strategies which might be used in attacking public school financing systems in the courts, gather them together as follows:

> "An Eclectic Approach. The disadvantages of these action-oriented t a c t i c s can be diminished without losing any advantages. What the child really seeks is a fair hearing on the merits of the constitutional issue, plus a declaration of principle, and the broadest possible freedom for the judge to coax and impel the legislature to a relevant response. On the whole, the approach that will most often serve these needs best is an action for a declaratory judgment naming as defendants state and county officials—and perhaps district boards and superintendents—who have the duty and power to collect the tax or spend for public education. Such a forum can produce a judgment upon the constitutionality of the whole package of laws.
>
> "Furthermore, having declared the system invalid, no immediate action would be required of the court. It could, as in Brown, wait a period to consider the remedy or await legislative reprise;

[59]Wisconsin v. Yoder, 405 U.S. ....., 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972).
[60]Kurland's Article at p. 591, J. Garner, Excellence: Can We Be Equal and Excellent Too? (1961).

this would be especially appropriate in a case where an intervening legislative session could address the question of the proper state response. All the political forces could participate in the remodeling of the state scheme while the court retained jurisdiction and awaited local developments. If the state did not respond in an acceptable fashion, the court could proceed by stages on motion of individual plaintiffs to excuse students from the duty of attendance, order admission in other districts, possibly award money compensation, begin to impound and then to redistribute equalization and flat funds, and then tie up the money of the richer districts. Before the court would shut down the entire system, use its contempt power, or raise taxes, it could even take a leaf from the book of reapportionment by hiring the computer expert who would assist the court in redrafting school districts to produce a uniform wealth base for each.'"[61]

In sum, the courts are not equipped to resolve the intricate multi-faceted problems involved in pursuing the ideal of providing high quality education to all the pupils of a state; these problems must be left to the legislatures and the Congress with the faith that, with all their imperfections, they will represent the will of the people of this country to zealously and diligently pursue that ideal.

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[61]Coons, et al., "Private Wealth and Public Education," *supra*, Chapter 12, "Conclusion: "Tactics and Politics," pp. 447-448. (Footnotes omitted.)

IV

THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE ORDER GRANTING THE INJUNCTION LACKS SPECIFICITY AND FAILS TO DESCRIBE IN REASONABLE DETAIL THE ACTS SOUGHT TO BE RESTRAINED AND BECAUSE OF ABSENCE OF INDISPENSABLE PARTIES.

Lack of Specificity

The Order of the Court below orders that:

> "(1) The defendants and each of them be preliminarily and permanently restrained and enjoined from giving any force and effect to the operation of said Article 7, § 3 of the Texas Constitution, and the sections of the Texas Education Code relating to the financing of education, including the Minimum Foundation School Program Act, insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the State as a whole, and that defendants, the Commissioner of Education and the members of the State Board of Education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions; * * * " (337 F.Supp. 280, 285-286.)

The court went on to order that this mandate be

stayed "for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; * * *." (337 F.Supp. 280, 286.)

In a recent case decided by this Court, *Gunn v. University Committee to End the War in Vietnam,* 399 U.S. 383, 386, 26 L.Ed.2d 684, 687, 90 S.Ct. 2013 (1970), the three-judge District Court below had rendered an opinion concluding with the following paragraph:

> "'We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirments.' 289 F. Supp. at 475."

The similarity between the language of this paragraph and the order here in question is readily apparent.

In *Gunn* this Court dismissed the direct appeal for want of jurisdiction on the ground that there was no

order of any kind either granting or denying an injunction, interlocutory or permanent, as required by 28 U.S.C. §1253.

This Court pointed out that its dismissal of the appeal was not based on a mere technicality that the basic reason for the limitations in 28 U.S.C. §1253 upon this Court's power of review is that until a district court issues an injunction, or enters an order denying one, it is not possible to know with any certainty what the lower court has decided.

This Court went on to state:

> "Rule 65(d) of the Federal Rules of Civil Procedure provides that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail . . . the act or acts sought to be restrained.'
>
> "As we pointed out in International Longshoremen's Assn. v. Philadelphia Marine Trade Assn. 389 U.S. 64, 74, 19 L.Ed. 2d 236, 244, 88 S.Ct. 201, the 'Rule . . . was designed to prevent precisely the sort of confusion with which this District Court clouded its command.' An injunctive order is an extraordinary writ, enforceable by the power of contempt. 'The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.' Id., at 76, 19 L.Ed. 2d at 245.

"That requirement is essential in cases where private conduct is sought to be enjoined, as we held in the Longshoremen's case. It is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State. Cf. *Watson v. Buck*, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 ALR 1426."

This Court pointed out that failure of the District Court to follow up its opinion with an injunction was an unfortunate result at best, for if confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it.

It is submitted that when the District Court does follow up its opinion with an order granting a mandatory injunction, as in the case at bar, but where the injunction lacks specificity and fails to describe in reasonable detail what the defendants must do, the result is even more unfortunate because state officials would no doubt face an even more serious dilemma inasmuch as the purportedly valid injunctive order would appear to them to be enforceable by the power of contempt.

It appears to be patent on its face that the order of the District Court below, requiring certain of the defendants to restructure the financial system "in such a manner as not to violate the equal protection provisions of both the United States and Texas Constitutions," fails to satisfy the standards established by Rule 65(d) of the Federal Rules of Civil Procedure. In *Swift & Company v. United States*, 196 U.S. 375,

396, 49 L.Ed. 518, 524, 25 S.Ct. 276 (1904) Justice Holmes, in reviewing an injunctive order under the Sherman Antitrust Act, stated:

> "The [Sherman Antitrust] law has been upheld and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties if we can."

It further appears that mandatory injunctions should be made especially clear.

As stated in *National Labor Relations Board v. Bell Oil & Gas Co.* (C.C.A. 5th, 1938) 98 Fed.2d 405 at 406-407:

> "Mandatory injunctions should be clear, direct and unequivocal. They should not be hedged about by conditions and qualifications which cannot be performed or which may be confusing to one of ordinary intelligence. If placed in a dilemma by an ambiguous order, one who acts in good faith and with due respect to the court is not guilty of contempt."

Since the complexities involved in the subject matter of this case are such as to clearly demonstrate that this Court is in no position to redraft the order of injunction so as to meet the requirements of Rule 65(d)

of the Federal Rules of Civil Procedure, it is respectfully submitted that the judgment must be reversed.

Lack of Indispensable Parties

Plaintiffs did not include among the defendants either the State Legislature, which adopted the school financing laws in question, and which has the power to change them, nor the Governor, whose power of approval and of veto can determine whether legislative enactments go into effect.

Rule 65(d) of the Rules of Federal Procedure also provides:

> "Every order granting an injunction * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

As pointed out in *Thaxton v. Vaughan* (4th Cir., 1963) 321 F.2d 474, 478, no valid decree may be entered in the absence of parties necessary to carry out the terms of the decree.

Professor Coons and his associates considered this problem as follows:

> "In this form of litigation the proper defendant is again difficult to identify. All the relief sought is beyond the power of any agent of the state operating under the existing state law. The real target is the legislature in all these cases but even

more directly here. Perhaps the legislature should be named defendant as it was in the *Colorado Assembly case.* (Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964).) The problem is that in reapportionment there was, at least in theory, a *duty* of the legislature to act; here there seems no duty, for public education is concededly not a right. Yet there is at least this right, that public education be either validly structured or abolished. (The thought is reminiscent of the prescription of *Brown v. Board of Education,* 347 U.S. 483 (1954), which passed no judgment upon the right to an education, but only upon the right to its dispensation without racial segregation.) Seemingly the state legislature has a duty to do one or the other which would render it the proper defendant. Even if such a duty exists, however, the inclusion of the legislature as a party is awkward and undesirable unless it is clearly necessary.'"[62]

Accordingly, the failure of the plaintiffs to include among the defendants the Legislature and the Governor should require a reversal. Perhaps it would be necessary to also include all school districts which would be adversely affected by the carrying out of the court's injunctive decree.

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[62]Coons, et al., Private Wealth and Public Education, supra, p. 445.

CONCLUSION

For the forgoing reasons amici respectfully submit that the judgment of the District Court below should be reversed with directions that the case be dismissed.

Respectfully submitted,

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APPENDIX "A"

INTERDISTRICT INEQUALITIES IN SCHOOL FINANCING: A CRITICAL ANALYSIS OF *SERRANO v. PRIEST* AND ITS PROGENY.

STEPHEN R. GOLDSTEIN †

Rarely has a state supreme court decision received such extensive publicity and public comment as the recent California Supreme Court opinion in *Serrano v. Priest*,[1] concerning the constitutionality of interdistrict disparities in financing California public school districts. Indeed, one might have to go back to the United States Supreme Court reapportionment cases to find a decision of any court that has been as extensively discussed in the press as has *Serrano*. Most significantly, the press comment seems to have been uniformly affirmative. The *Serrano* result has been popularly hailed as rightly egalitarian and a significant, if not the significant, step in the struggle for better education in urban areas.[2] Even those editorial writers who have traditionally been proponents of judicial restraint have refrained from commenting adversely upon the court's decision invalidating California's public school financing system.

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[1] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[2] *See, e.g.*, N.Y. Times, Sept. 1, 1971, at 17, col. 1; *id.*, Sept. 2, 1971, at 32, col. 1; at 55, cols. 1, 2; *id.*, Sept. 5, 1971, § 4, at 7, col. 1; at 10, col.3.

In part this absence of adverse comment may be attributable to the fact that it was the California Supreme Court and not the United States Supreme Court that decided the case. Yet, the decision's impact is clearly not confined to California. The California school finance system is similar in effect to the systems used in 49 of the 50 states,[3] and the court avowedly rested its decision on federal equal protection grounds.[4]

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[3]Hawaii is the only state without local school district control of education. HAWAII REV. LAWS §§296-2, 298-2 (1968).

[4]The court specifically rejected the argument that the California financing system violated art. IX, §5 of the California Constitution, which provides for "a system of common schools." It then stated: "Having disposed of these preliminary matters, we take up the chief contention underlying plaintiffs' complaint, namely that the California public school financing scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution." 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609. Despite having thus based its decision on federal constitutional grounds, the court, in a puzzling footnote, *id.* at 596 n.11, 487 P.2d at 1249 n.11, 96 Cal. Rptr. at 609 n.11, then referred to 2 provisions of the California Constitution requiring that "[a]ll laws of a general nature shall have a uniform operation," CAL. CONST. art. I, §11, and prohibiting "special privileges or immunities," *id.* art. I, §21. The court went on to state that:

> We have construed these provisions as "substantially the equivalent" of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. (Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal. 2d 586, 588, 43 Cal. Rptr. 329, 400 P.2d 321.) Consequently, our analysis of plaintiffs' equal protection contention is also applicable to their claim under these state constitutional provisions.

Id.

Following this, there was no further mention of the California Constitution in the opinion and almost all authorities cited concern federal law. The court also devoted considerable effort to avoiding the argument that the federal constitutional issues has been foreclosed by the United States Supreme Court summary affirmances in McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969), and Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970). The California Supreme Court, of course, would not be limited by a United States Supreme Court interpretation of the California Constitution.

The footnote quoted above, and the explicit citation to *Kirchner*, however, raise the issue whether, despite its express reliance on the Federal Constitution, the court has not also relied on the California Constitution in a way that precludes United States Supreme Court review.

In *Kirchner*, the Califoria Supreme Court held unconstitutional a state statute relating to liability for the care and maintenance of mentally ill persons in state institutions. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964). The United States Supreme Court granted certiorari but vacated and remanded the case to the California court on the grounds that the California opinoin was unclear as to whether it was based on the federal or state

It has also been expressly followed by a federal district court in Minnesota in denying a motion to dismiss[5] and by a three-judge district court in Texas in holding that state's financing scheme unconstitutional.[6] While it is clear, at least at this time, that the *Serrano* decision itself will not be reviewed by the United States Supreme Court,[7] there are many other interdistrict

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consitutions or both, and that the United States Supreme Court would not have jurisdiction unless the federal Constitution had been the sole basis for the decision, or the state constitution had been interpreted under what the California court deemed the compulsion of the Federal Constitution. 380 U.S. 194 (1965). On remand, the California Supreme Court stated that although CAL. CONST. art I, §§11 & 21 were generally thought to be "substantially the equivalent" of the federal aqual protection clause, the court was "independently constrained" in its result by these sections of the state constitution. The court stated that it had not acted "solely by compulsion of the Fourteenth Amendment, either directly or in construing or applying state law . . . ." 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965).

Although the issue is not completely free from doubt, the California Supreme Court in *Serrano* may have written an opinion expressly based on federal law yet at the same time insulated from review by the United States Supreme Court.

[5]Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971).

[6]Rodriguez v. San Antonio Ind. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971). Procedurally, *Rodriguez* has developed further than *Serrano*, as the court there, after a hearing, declared the Texas financing scheme unconstitutional and permanently enjoined the defendants, the State Commissioner of Education, and the members of the State Board of Education, from enforcing it. The court, however, stayed its mandate and retained jurisdiction for 2 years:

> in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law . . . .
>
> . . . .
>
> The Court retains jurisdiction of this action to take such further steps as may be necessary to implement both the purpose and spirit of this order, in the event the Legislature fails to act within the time stated . . . .

Id. at 286. For retention of jurisdiction the court cited cases of judicially imposed reapportionment plans.

[7]*See* note 4 *supra*. In addition to the problem of the independent state ground for the *Serrano* decision, it is clear that the Supreme Court cannot review it at this time because it is not a final judgment. *See* 28 U.S.C. §1257 (1970).

inequality cases in the process of litigation,[8] at least one of which will soon present the United States Supreme Court with the *Serrano* problem.[9]

The primary reason for the favorable reception of *Serrano* is probably the growing public eagerness for its result. Unlike many other societal problems in education and other areas, the concept of fiscal equality in education is perceived as unambiguously good. It does not appear to involve the competing views of equality prevalent in desegregation and community control issues. Nor does it represent the significant clash between the values of equality and liberty that the desegregation and community control issues may present. The only visible liberty being curtailed is local economic self-determination, a value currently of low priority in our society when balanced against the promise of improving education for the poor and racial minorities. Fiscal equality also holds out the promise of improving education for the poor and racial minorities, without raising the fears of personal adverse effects on the white middle-class family aroused by other proposed policies, such as desegregation. Fiscal equali-

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[8]Also pending before a 3-judge court is the constitutionality of the Florida school financing system. *See* Askew v. Hargrave, 401 U.S. 476 (1971), *vacating per curiam* Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970). Recent state court decisions that followed *Serrano* are: Hollins v. Shofstall, No. C-253652 (Super. Ct. Maricopa County, Ariz. Jan. 13, 1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972); Sweetwater County Planning Comm. for the Organization of School Dists. v. Hinkle, 491 P.2d 1234 (Wyo. 1971). In disagreement with *Serrano* is Spano v. Board of Educ., 328 N.Y. S.2d 229 (Sup. Ct. 1972). The issue is now before the court in more than half the states. *See* Wall St. J., Mar. 2, 1972, at 1, col. 6.

[9]It appears that the decision in *Rodriguez* is immediately appealable to the United States Supreme Court. *See* 28 U.S.C. §1253 (1970). If appealed, it would presumably be heard in the October term, 1972.

ty involves the movement of inanimate dollars, not live children.[10]

Finally, fiscal equality corresponds to a basic American belief that more money, or money distributed more wisely, can solve major societal problems such as the current state of public education, and that all society need do is to have the will to so spend or distribute it. In Daniel P. Moynihan's terms, *Serrano* leads one to hope that what may have been considered a "knowledge problem" is indeed a "political" one, or better yet, a judicial one.[11]

Serrano is unquestionably sound as a matter of abstract egalitarian philosophy. Nevertheless, there are many difficulties presented by its legal analysis. Moreover, it is not at all clear that the practical effect of the decision will be to improve the quality of public education generally, or the quality of urban public education in particular.

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[10]The *Serrano* result and metropolitan desegregation, *e.g.*, Bradley v. School Bd., 40 U.S.L.W. 2446 (E.D. Va. Jan. 5, 1972), can be viewed as alternative methods of improving the educational quality of urban minority groups, to the extent that the argument for metropolitan desegregation rests on a desire to give the black urban poor access to the tax base of their more affluent white suburban neighbors. *Compare* Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971), *with* Johnson v. San Francisco Unified School Dist., No. C-70 1331 SAW (N.D. Cal. June 2, 1971). *See also* Spencer v. Kugler, 40 U.S.L.W. 3333 (U.S. Jan. 17, 1972); United States v. Board of School Comm'rs. 332 F. Supp. 655 (S.D. Ind. 1971).

[11]Moynihan, *Can Courts and Money Do It?*, N.Y. Times, Jan. 10, 1972, §E (Annual Education Review), at 1, col. 3; *id.* at 24, col. 1.

I. School District Inequality and the *Serrano* Response

A. *The Court's Response to Interdistrict Financing Differentials*

As is true with every state except Hawaii, over 90% of California's public school funds derive from a combination of school district real property taxes and state aid based largely on sales or income taxation. Historically the state aid, or "subvention," has been superimposed on the basic system of locally raised revenue. Although the state aid component of educational expenditures has been generally increasing as a percentage of the total expenditures, the local component has remained dominant. California is typical in having total educational expenditures consist of 55.7 percent local property taxes and 35.5 percent state aid.[12]

The local component is a product of a locality's tax base (primarily the assessed valuation of real property within its borders) and its tax rate. Tax bases in California, as elsewhere, vary widely throughout the state. Tax rates also vary from district to district.

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[12]In addition, federal funds account for 6.1% and other sources for 2.7%. These figures and others given for California in this Article are taken from the court's opinion in *Serrano*. 5 Cal. 3d at 591 n.2, 487 P.2d at 1246 n.2, 96 Cal. Rptr. at 606 n.2.

In discussig expenditure differentials, the *Serrano* court did not indicate whether or not its figures included federal revenues. Other authorities have excluded federal revenues from these calculations. This author has elsewhere questioned the validity of this exclusion. *See* Goldstein, Book Review, 59 Calif. L. Rev. 302, 303-04 (1971). Nationwide, approximately 52% of all school revenue is collected locally, and from 97-98% of local tax revenue is derived from property taxes. Briley, *Variation between School District Revenue and Financial Ability. in* Status and Impact of Educational Finance Programs 49-50 (R. Johns, K. Alexander & D. Stollar eds. 1971) (National Educational Finance Project vol. 4). In California, all local school revenues are raised by property taxation. *See* Cal. Educ. Code §§20701-06 (1969).

The state component of school expenditures is generally distributed through a flat grant system, a foundation system, or a combination of the two. The flat grant is the earliest and simplest form of subvention, consisting of an absolute number of dollars distributed to each school district on a per-pupil or other-unit standard. Foundation plans are more complicated and have a number of variants. In its simplest form, a foundation plan consists of a state guarantee to a district of a minimum level of available dollars per student, if the district taxes itself at a specified minimum rate. The state aid makes up the difference between local collections at the specified rate and this guaranteed amount. If the actual tax rate is greater than the specified rate, the funds raised by the additional taxes are retained by the locality but do not affect the amount of state aid.

Finally, there are combinations of flat grants and foundation plans. Under one form of combination plan the flat grant is added to whatever foundation aid is due to the district:

> State Aid = [guaranteed amount — local collection at specified rate] + flat grant.

Under the other combination system, the flat grant is added to the local collection in initially calculating the foundation grant:

> State Aid = [guaranteed amount — (local collection at specified rate + flat grant)] + flat grant.

Under this approach, a district that would qualify for a state foundation grant equal to, or in excess of, the flat grant does not in effect receive the flat grant. That grant is superfluous when it serves only to bring a district up to the foundation level, because a district is always guaranteed the foundation level in any case. The full benefit of the flat grant goes only to those districts where the local collection at the specified rate equals or exceeds the foundation guarantee.

The latter combination plan is the system employed in California.[13] The flat grant is $125 per pupil. The foundation minimum, based on a tax rate of 1.0 percent for elementary school districts and 0.8 percent for high school districts,[14] is $355 for each elementary school pupil and $488 for each high school student, subject to specified minor exceptions. An additional state program of "supplemental aid" subsidizes particularly poor school districts that are willing to set local tax rates above a certain statutory level. An elementary school district with an assessed valuation of $12,500 or less per pupil may obtain up to $125 more for each child under this plan. A high school district whose assessed valuation does not exceed $24,500 per pupil can

[13]As noted, this results in the quirk that the full effects of the flat grant are available only to those districts whose revenue at the prescribed rate exceeds the foundation guarantee. There would seem to be no rational basis for this result. The *Serrano* court, however, did no more than mention this fact and there is no indication that the opinion rested on it.

[14]This is simply a computational tax rate used to measure the relative tax bases of the different districts. It does not necessarily relate to the actual rates levied.

receive a supplement of up to $72 per pupil if it taxes at a sufficiently high rate.[15]

Although the foundation plan does help to equalize available educational funds throughout the state, the relatively low foundation guarantee nevertheless allows significant disparities among school districts. The *Serrano* court cited the following statistics for the 1969-1970 school year for district per-pupil educational expenditures:

	Elementary	*High School*	*Unified*[16]
Low	$ 407	$ 722	$ 612
Median	672	898	766
High	2586	1767	2414

Statistics cited by the court for assessed valuations per pupil also reflected the disparities:

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[15]There are other minor provisions in the state subvention system. Districts that maintain "unnecessary small schools" receive $10 per pupil in their foundation guarantee, a sum intended to reduce class sizes in elementary schools. Unified districts (those which contain both elementary and secondary schools) receive $20 more per pupil in foundation grants. In addition, a special program attempts to provide equalization in districts included in reorganization plans that were rejected by the voters. It gives the poorer districts in the reorganization the effect of the reorganization to the limited extent of levying a tax areawide, of 1.0% in elementary districts and 0.8% in high school districts. The resulting revenue is then distributed among the individual districts according to the ratio of each district's foundation level to the areawide total revenue. Thus, in these rare circumstances of voter-rejected reorganization plans, poorer districts share in the higher tax bases of wealthier districts in their area. The districts are, of course, free to tax themselves above the 1.0% or 0.8% level and retain all additional revenue. 5 Cal. 3d at 593 n.8, 487 P.2d at 1247 n.8, 96 Cal. Rptr. at 607 n.8.

[16]*Id.* at 593 n.9, 487 P.2d at 1247 n.9, 96 Cal. Rptr. at 607 n.9.

	Elementary	*High School*[17]
Low	$ 103	$ 11,959
Median	19,600	41,300
High	952,156	349,093

The complaint in *Serrano* set forth two main causes of action. The first was that of plaintiff school children residing in all school districts except the one that "affords the greatest educational opportunity," who alleged that:

> As a direct result of the financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State . . . . The educational opportunities made available to children attending public schools in the Districts, including plaintiff children, are substantially inferior to the educational opportunities made available to children attending public schools in many other districts in the State . . . .[18]

The financing scheme was alleged, therefore, to violate the equal protection clause of the fourteenth amendment and various clauses of the California Constitution.

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[17] *Id.* Note that these figures and those in the text accompanying note 16 *supra*, represent the extremes and thus may be skewed, as extremes often are. In this case a major skewing mechanism may be an abnormally low number of public school students in a given district. Even outside the extremes, however, the discrepancies in California are substantial. These assessed valuation per pupil figures also assume uniform assessment practices. This assumption was not discussed by the court. The discrepancies were much less substantial in Texas but the system was invalidated nonetheless. *See* Rodriguez v. San Antonio Ind. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971).

[18] 5 Cal. 3d at 590. 487 P.2d at 1244, 96 Cal. Rptr. at 604.

The second cause of action, brought by the parents of the school children, as taxpayers, incorporated all the allegations of the first claim. It went on to allege that as a direct result of the financing scheme, plaintiffs were required to pay a higher tax rate than taxpayers in many other school districts to obtain for their children the same or lesser educational opportunities.

The complaint sought: (1) a declaration that the system as it existed was unconstitutional; (2) an order directing state administrative officials to reallocate school funds to remedy the system's constitutional infirmities; and (3) retention of jurisdiction by the trial court so that it could restructure the system if the legislature failed to do so within a reasonable time[19] The trial court sustained a general demurrer to the complaint and the action was dismissed. The dismissal of the complaint for failing to set forth a cause of action was appealed to the California Supreme Court.

The California Supreme Court stated the issue in the first line of its opinion:

> We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment.[20]

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[19] *Id.* at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

[20] *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

The court immediately went on to hold:

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.[21]

In so holding, the California court employed the "new equal protection" analysis. Under this doctrine, certain types of legislative classification require a higher level of state justification to pass judicial scrutiny than is required under the traditional "rational basis" equal protection test. This doctrine holds that if a suspect classification is employed, and the classification pertains to a fundamental interest,[22] then the

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[21] *Id.*

[22] It is unclear whether the court regarded the fundamental interest and suspect classification tests as operating in conjunction with each other as stated in the text or as operating independently. *Compare id.* at 612, 487 P.2d at 1261, 96 Cal. Rptr. at 621, *with* 5 Cal. 3d at 604, 487 P.2d at 1257, 96 Cal. Rptr. at 615. To the extent the court suggested that either test, operating independently, would trigger the "special scrutiny" review of state action, it appears to be an inaccurate view of the present state of the law as applied to state actions other than racial classifications.

The invariable formulation of the doctrine as applied to wealth classifications requires both wealth classification and impairment of a fundamental interest in some varying combination. *See* Bullock v. Carter, 40 U.S.L.W. 4211, 4214 (U.S. Feb. 24, 1972); Dandridge v. Williams, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting). But *see* Shapiro v. Thompson, 394 U.S. 618, 658 (Harlan, J., dissenting.) *See* generally J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education 339-446 (1970) [hereinafter cited as Private Wealth and Public Education].

classification violates the equal protection clause unless it is necessitated by a compelling state purpose. A fuller discussion of the *Serrano* court's use of this doctrine follows.

B. *The Choice of a Standard of Equality: Response to Activist Legal Scholarship*

The most striking element in the California Supreme Court's holding was its reliance on the relationship between the *wealth* of a school district and its educational expenditures. By "wealth" the court meant taxable wealth (property tax basis[23]) per pupil or other unit. Yet, as stated above, the local component of school financing is a product of taxable wealth and tax rate. A district's expenditures may be low because it is low in taxable wealth or because it chooses to tax itself at a low rate, or both. Why, then, did the court focus on wealth differences as the constitutional vice, rather than on disparities in expenditures, regardless of cause?

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[23] *Serrano* and its progeny have been predicated on the assumption of the exclusive use of the real estate property tax for local education financing. As stated in note 12 *supra*, however, nationwide property taxes constitute 97-98% of local taxes for education and thus are *almost* the exclusive but are not the exclusive means of local financing. Indeed, by 1968-1969, 22 states and the District of Columbia authorized the use of local nonproperty taxes by local school districts. ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION 186 (1971) (National Educational Finance Project vol. 5). While this still amounted to less than 3% of local education taxes nationwide, in a given state the amount could be sufficiently significant that the *Serrano* analysis premised on exclusive real estate taxation would be inapplicable. For example, in Pennsylvania local nonproperty taxes in 1968-1969 produced a mean revenue per pupil of $101.30 in central city districts. *Id.* 187.

Local nonproperty taxes include occupational, utility, and other excise taxes, as well as local sales and income taxes. Tax bases for such taxes would be much more difficult to calculate than is a given locality's real property tax base.

To understand this, one must know something about the legal literature that predated *Serrano*. The literature in this field, particularly the book *Private Wealth and Public Education*,[24] exemplifies a current wave of consciously activist scholarship, written with an avowed bias, and aimed at producing specific legal results. This new breed of writers, not content with pure scholarship, actively engages in the litigation process to accomplish their aims.[25] This activist legal scholarship—of a very high caliber—produced the legal formulations manifested in *Serrano*.[26]

Serrano apparently adopted as the constitutional rule what was denominated as Proposition 1 in *Private Wealth and Public Education*:[27] "The quality of public education may not be a function of wealth other than the wealth of the state as a whole."[28] Proposition 1

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[24]*Supra* note 22.

[25]Coons and Sugarman, for example, filed amicus briefs in *Serrano* and *Rodriguez*.

[26]Although the court acknowledged its reliance on Coons, Clune & Sugarman by citations throughout the opinion, it cited a law review article, Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969), rather than the more comprehensive analysis in PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22. The reason for this is not clear. This may reflect only the opinion writer's relative access to the two works. It may also reflect the court's sensitivity to the reader's relative access to the two works. Finally, it might be suggested that it represents a possible reflection of the difference in esteem, in California, between the California Law Review and the Harvard University Press.

[27]The following discussion of Proposition 1 and district power equalizing is based upon, and some parts are taken entirely from, an earlier analysis of *Private Wealth and Public Education* by this author. Goldstein, Book Review, 59 CALIF. L. REV. 302, 304-10 (1971).

[28]PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22, at 2 (emphasis omitted). Proposition 1 is, however, never directly quoted by the *Serrano* Court. The federal court in Van Dusartz, 334 F. Supp. 870 (D. Minn. 1971), which expressly relied on *Serrano*, did quote Proposition 1 and explicitly accepted it as the constitutional standard. *Id.* at 872 & n.1. Somewhat less

itself was a response to prior debate about interdistrict disparities in educational offerings. Recently there has been increased concern with inequalities in government services, especially as they affect the poor. In particular, society has become increasingly concerned with the deplorable condition of urban public education. It has been argued that a major cause of this condition is the relative lack of resources available to urban school districts as compared to their more affluent suburban neighbors. Moreover, there has been increased recognition that plans for improving urban education through such alternatives as integration, decentralization and community control, or compensatory education are, in the final result, highly dependent on the availability of greater resources for urban school districts.

Although the exact relationship between financially poor school districts and poor people, particularly the urban poor, is unclear,[29] the existence of large wealth discrepancies among school districts is undeniable. The disparity in the quality of education, as conventionally measured, between urban and suburban school districts

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clearly the 3-judge court in *Rodriguez* seemed to adopt Proposition 1 as the constitutional rule.

One caveat must be stated regarding the *Serrano* court's acceptance of Proposition 1 as the constitutional test. As will be discussed at length, text accompanying notes 30-44 *infra*, Proposition 1 and *Serrano* do not require equality of expenditures. Neither, however, is Proposition 1 satisfied by equality of expenditures. If equal expenditures were achieved by differential rates applied to differential tax bases, that is, lower tax base districts achieving the same revenue level by employing higher rates, Proposition 1 would not be satisfied. At this point Proposition 1 leaves education as its concern and becomes completely taxpayer oriented. Despite the taxpayer orientation in *Serrano*, *see* text accompanying notes 86-91 *infra*, it is unlikely that the *Serrano* court would go this far. Throughout the opinion, the court emphasized differential educational expenditures.

[29] *See* notes 65-75 *infra* & accompanying text.

is also apparent. Thus the existing system of educational financing has been increasingly condemned as intolerable. However, there has existed substantial disagreement on methods of relief. Opponents of judicial intervention have argued against court action to invalidate the current system: first, for lack of a workable judicial standard; secondly, because an equality concept might result in a downward leveling of expenditures when the real need is to improve low quality; thirdly, because judicial relief would result in centralization of educational financing; and fourthly, because an equality requirement that prevented local school expenditures above the state norm would be either unworkable or would result in substantial middle class exodus from the public schools.[30]

Proposition 1 was an avowed attempt to respond to these criticisms. By adopting it, the California Supreme Court has apparently limited its decision to wealth-derived educational differentials and has not required equal expenditures statewide. On this basis of decision, there are a number of alternative school financing systems that would meet the court's constitutional standard. Among these is abolition of local school districts and their replacement with a completely statewide system. Short of that, centralized state financing

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[30] *See* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U.CHI. L. REV. 583 (1968). For the views of the proponents of judicial intervention, see A. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 145-59 (1968); Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. REV. 787 (1968); Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635 (1968).

that raises and distributes all funds could be coupled with local district administration of the schools. Centralized financing, however, is not required under the *Serrano* rule invalidating only wealth-derived differentials. A general school redistricting that equalized wealth among school districts would satisfy the decision and at the same time allow the present system of financing and administration to continue. Finally, there is the innovative suggestion proposed in *Private Wealth and Public Education*—district power equalizing—a system that allows differential expenditures among school districts, while removing the effect of differential tax bases on these expenditures.

Under district power equalizing, existing school districts would have funds available for education based on their tax rate regardless of their tax base. A school district would be free to choose any tax rate it desired and its available funds—defined as "x dollars per educational unit"—would be established by the state for any given tax rate. In a simplified model, a district power equalizing scheme might appear as follows:

Tax Rate	*Available Funds*
1 %	$ 400 per educational task unit
1½	600
2	800
2½	1000
3	1200

A district with a low tax base whose chosen tax rate produced less revenue than the state prescribed amount

would receive state funds to make up the difference. A district that produced more revenue than the state prescribed amount at its chosen rate would be required to pay the excess to the state.

The scheme of power equalizing as a means to satisfy the requirements of Proposition 1 has been attacked on equalitarian grounds. It requires merely that district wealth disparities be eliminated as a factor in financing education, thus still permitting districts to spend more by taxing more. What is in fact required, it is argued, is statewide equality of learning opportunity to the extent achievable by statewide financing.[31] The *Serrano* decision is subject to the same attack insofar as the court adopts an equal wealth formula, rather than an equal expenditure formula.

It is not indisputably clear, however, that the court has rejected the equalization of expenditures formula. Although the language quoted above, and other statements in the opinion seem to accept the equal wealth standard, it might well be argued that the court decided only the facts before it—that the existing financing scheme was unconstitutional—and did not go so far as to endorse an equal wealth standard or reject the argument that an equalization of expenditures standard is constitutionally required. Indeed, in response to an argument that autonomous local decisionmaking was so important a value that it

[31] *See, e.g.*, Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 Wis. L. Rev. 7, 26-28, 30.

justified the existing system, the court stated: "We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal free will is a cruel illusion for the poor school districts."[82] Other evidence of the court's possible acceptance of the equal expenditure formula as being constitutionally required is its specific recognition that many of the values of local choice could still be preserved under a spending equalization formula that centralized financing but localized administration of schools.

The court's possible failure to rule out a constitutional command of expenditure equalization may also be explained by the fact that tax base, not tax rate, is the main determinant of local educational expenditures. Available statistics, in California and elsewhere, indicate that districts with smaller tax bases, such as Baldwin Park, tax themselves at higher rates than do richer districts, such as Beverly Hills, even though their total yield is not as great.[83] Therefore, the *Serrano* court may have assumed that Proposition 1, which removes the wealth factor, would produce generally equal offerings among school districts, and thus left until another day the issue of what happens if it does not.

These reasons, however, are not sufficient to explain the very strong equal wealth emphasis in the

[82] 5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.
[83] *Id.*; PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22, at 127-50. *See also* ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION 81-101 (1971) (National Educational Finance Project vol. 5).

Serrano opinion. The most logical reading of the decision is that the court did adopt the formula of equal wealth rather than the equal expenditures formula as its constitutional command. The probable explanation for this is twofold. First, an expenditure equalization standard would cause problems with compensatory education and other programs that would devote extra funds for the education of disadvantaged students. The propopents of equal expenditures are also in favor of this degree of inequality and struggle valiantly to make these concepts consistent. Perhaps their struggles are successful. It is much easier, however, to avoid the inconsistency by not adopting an equal expenditure test in the first place.

The second basic argument in favor of an equal wealth standard is that it permits a local school district to choose how much it wishes to spend on the education of its children. The desirability of retaining this local choice responds to basic federalist, pluralist values of diversity and local decisionmaking—a concept termed "subsidiarity" in *Private Wealth and Public Education.*[34] In *Serrano* the state argued that the existing school financing system was constitutionally valid because it incorporated just these values.[35]

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[34]PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22, at 14-15. Subsidiarity is "the principle that government should ordinarily leave decisionmaking and administration to the smallest unit of society competent to handle them." *Id.* 14. *See also* Goldstein, Book Review, 59 CALIF. L. REV. 302, 306 (1971).

[35]The court quoted the state's argument that:

"[I]f one district raises a lesser amount per pupil than another district, this is a matter of choice and preference of the individual district and reflects the individual desire for lower taxes rather than an expanded educational program, or may reflect a greater interest within

The court's response, while rejecting the state's argument, shows sensitivity to the idea of local choice:

> [S]o long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.[36]

The *Serrano* court did recognize that local choice in nonfiscal educational matters might still be retained under centralized financing; yet this limited degree of choice is not sufficient. As a purely theoretical issue it is difficult to determine the value of retaining local control over educational spending, particularly when weighed against the possibility of continuing expenditure inequalities, which the retention of local choice produces. But this issue is not merely a matter of political theory. Rather, adoption of the equal wealth standard in *Serrano* is an implicit recognition of the fact that, in light of our history and traditions, judicial or legislative decrees cannot be used to prevent localilies from trying to get better education for their children by raising more funds locally.

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that district in such other services that are supported by local property taxes as, for example, police and fire protection or hospital services."
5 Cal. 3d at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

[36] *Id.*

A pre-*Serrano* law review article[37] by Silard and White, which dismissed district power equalizing in one paragraph as not producing equality of educational offerings, ended discussion of its equalization solution, centralized financing, by adding: "The [centralized financing] mechanism might also be formulated in such a way as to *retain a local option to surtax for additional education.*"[38] This "local option" is obviously a device to allow localities to spend more on education than the centrally determined norm, and thus produce inequalities in offering. Despite their very strong commitment to egalitarian principles, proponents of judicial action in this field obviously cannot resist the notion that local districts should retain the option to spend more on education. It is this fact, deeply embedded in our public consciousness, that primarily explains why the *Serrano* court did not and would not require spending equality.[39]

The existence of this public sense raises a further question about the limits of *Serrano*. Is the Silard and White system—centralized financing with a local option surtax—consistent with the California court's constitutional standard? While the spending equalization standard is not required under *Serrano*, it remains to be seen what minimal remedies are consistent with the

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[37]Silard & White, *supra* note 31.

[38]*Id.* 29 (emphasis added).

[39]This public feeling was clearly expressed in the response to the *Serrano* decision in a New York Times editorial. After hailing the case on egalitarian grounds, the editorial abruptly concluded with the assertion that the ideal solution for school financing lies in centralized state financing "without discouraging additional investments by education minded communities in the betterment of their schools." N.Y. Times, Sept. 2, 1971, at 32, col. 1.

standard actually adopted by the court, and thereby determine the limits of its holding. Any appearance of consistency between *Serrano* and the surtax proposal is nothing more than a semantic illusion, unless the surtax were based on power equalization or another scheme that removed differential tax bases as an element in a district's ability to surtax itself. Otherwise the surtax has the same constitutional defect as that condemned in *Serrano* because the quality of a child's education remains dependent on the district's wealth. In fact, the surtax system is the present system in California—it is the foundation plan. The justifications for the surtax are the reasons given above for preferring district power equalizing over expenditure equalization—subsidiarity and the deeply embedded feeling that one cannot preclude a locality from taxing itself more heavily, if it so chooses, to get better education for its children. But, if one accepts the *Serrano* equal protection reasoning, these concepts and this felt need are only sufficient to justify the surtax if the surtax is necessitated by a compelling state purpose. It is not clear that these factors even provide a sufficiently compelling purpose to justify district power equalizing. Even if they do, however, they would not justify a non-power equalized surtax. Such a surtax is not necessary, because its objective of allowing local choice can be achieved by power equalizing. Thus, because it has the *Serrano*-determined constitutional vice of differential expenditures related to differential tax bases that power equalizing does not have, it must be invalid under *Serrano*.

The proposal of a centralized financing system with a local surtax option also suggests that the evils of school finance might be remedied merely by increasing the minimum spent per child. Following this line, a system that increased the California foundation plan, say from $500 to $1000, might be said to accomplish the goal of providing to each student, regardless of the district in which he resides, an adequate level of educational expenditure. Such a constitutional standard would be based not on equal protection but on a constitutional right to an affirmative minimum provision of services similar to that suggested by Professor Frank Michelman and discussed later in a footnote to this Article.[40] One of the most fundamental objections to this concept of minimum provision of services is the inability of courts to determine at what point the minimum of a given service has been reached. In the hypothetical above, $1000 was used, but why should the minimum not be $1200? Indeed, why is the current minimum of approximately $500 unacceptable? Apparently the California legislature believed it to be sufficient.

One might simply argue that a minimum of $500 is unreasonable, a determination that a court could make without having to determine exactly what the minimum should be. Such an approach, however, ignores the need for judicial standards as illustrated by recent Supreme Court history. As happened in reapportionment be-

[40] *See* note 84 *infra*; Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment, The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7 (1969).

tween the *Baker v. Carr*[41] "rationality" test and the *Reynolds v. Sims*[42] "one man-one vote" test, once a court defines a principle it is difficult to stop short of setting a minimum standard.[43]

Lastly, one may argue that, under a system with a sufficiently large state minimum, the surtax is merely a minor deviation that will be permitted under *Serrano* in the same manner that the United States Supreme Court has allowed a degree of deviation from mathematical precision under its one man-one vote rule. The two situations are not comparable, however. The surtax, unlike the unavoidable, inconsequential deviations of voting district mathematics, is a policy decision to allow some school districts to make their schools unequal to schools in other districts. The more apt reapportionment analogy is deviation for policy preferences, such as protecting rural areas. Such policy preferences have been rejected by the Supreme Court in the reapportionment cases.[44] Of course, in school financial equalization there will be deviations from

[41]369 U.S. 186 (1962).

[42]377 U.S. 533 (1964).

[43]Professor Michelman recognized this when he hypothesized the application of his minimum protection theory to education. After suggesting that each child was constitutionally entitled to a minimum provision of education, he concluded that minimum provision would mean equalization. He based this conclusion on the fact that education is valued because of its relevance to competitive activities; thus the minimum required for *A* must be determined in relation to what his competitor, or future competitor, *B*, is receiving. While there is merit in this position, Professor Michelman overstates it when he thereby equates the minimum with no substantial inequality. The fact that he does so, however, is indicative of the standardless nature of the minimum provision theory. Professor Michelman thus is driven to equalization in order to provide a standard. Michelman, *supra* note 40, at 47-59.

[44]*See* Reynolds v. Sims, 377 U.S. 533, 562-68 (1964). *But see* Abate v. Mundt, 403 U.S. 182 (1971).

mathematical certainties as a result of such things as differential labor costs and economies of scale. Such deviations occur because of a practical inability to achieve perfect equality. The surtax is not such a deviation. It represents a conscious decision to create inequality.

II. District Wealth Discrimination: A Suspect Classification?

While the California Supreme Court's reliance on an equal wealth formula thereby precludes resort to remedies such as the surtax system, and limits the holding so that it does not require expenditure equalization, the court's adoption of equal wealth has significance beyond its force as a limitation. Wealth discrimination was, in fact, the affirmative basis used to invalidate an almost universal school financing system. The *Serrano* court cited "wealth discrimination" as one of the "suspect classifications" that, in conjunction with a fundamental interest, triggered the "new equal protection."[45]

The *Serrano* court held that "this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors,"[46] that is, the wealth of his school district. The factual data relied on by the court in reaching this result, however, consisted of disparities in tax bases and school expendi-

[45] 5 Cal. 3d at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.
[46] *Id.* at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

tures among school districts. Therefore, two basic questions must be answered before this holding is related to the data:

1. What is the relationship between school expenditures and the "quality" of a child's education?

2. What is the relationship between poor districts —districts with low taxable wealth—and poor people?

A. *The Relationship of Expenditures to Educational Quality*

The problem of relating levels of educational expenditures to quality of education is a persistent and annoying one. For one thing, there is no consensus on what the desired educational outputs are, or how educational quality should be measured. Secondly, there is very little empirical data to support a finding of an affirmative relationship between expenditure levels and measurable educational outputs.

The Coleman Report,[47] the leading study attempting to correlate selected educational outputs with various inputs, founds little relationship between expenditure levels and the educational outputs it measured, when other variables were held constant.[48] While the Coleman Report's methodology has been attacked persuasively,[49] affirmative data that dispute its conclusion

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[47] Office of Education, U.S. Dep't of Health, Education & Welfare, Equality of Educational Opportunity (1966).

[48] *See id.* 20-21, 312-16.

[49] *See* Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. Human Resources 3 (1968).

remain minimal.[50] The Coleman Report and other studies are concerned with spending differentials only within the relatively narrow range of current school expenditures. The lack of correlation between expenditure levels and educational outputs in this range does not preclude the possibility of some absolute minimum of expenditures being necessary to achieve measurable educational outputs. Further, this absence of correlation between expenditures and outputs is more understandable when it is recognized that approximately two-thirds of a typical school district's revenues are spent for teacher salaries.[51] Differences in teacher salaries are often a function not of teaching quality, but of such indirectly related factors as longevity and educational degrees. Differences in salary scales among districts may be the result of such factors as differential general wage scales and the bargaining power of teacher unions. The *Serrano* court discussed the problem of relating expenditures to quality in a footnote and admitted that "there is considerable controversy among educators over the relative impact of educa-

[50]Some support for a correlation between expenditure level and quality of education is found in J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY (1971). This support, however, is hardly sufficient to support a judicial finding of correlation. Moreover, a recently published reexamination of the Coleman data by a score of eminent social scientists in a faculty seminar at Harvard University has confirmed the findings of the original report, while avoiding some of the original report's methodological problems. Indeed, this reexamination indicates that the influence of school expenditures on student achievement is even weaker than was indicated by the original Coleman Report. *See* Mosteller & Moynihan, *A. Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 36-45 (F. Mosteller & D. Moynihan eds. 1972); Jencks, *The Coleman Report and the Conventional Wisdom*, in *id.* 69-115; Smith, Equality of Educational Opportunity: *The Basic Findings Reconsidered*, in *id.* 230-42.

[51]Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1359 (1971).

tional spending and environmental influences on school achievement . . . ."[52]

The court avoided the problem in two ways. One was to cite other cases that have rejected the argument that there is no proof that different levels of expenditure affect the quality of education.[53] Except for the latest decision in *Hobson v. Hansen*,[54] discussed below, these cases have not given a rationale for this rejection.

Secondly, the court relied on the procedural posture of the case. Since the complaint was dismissed on demurrer, the court countered the defendant's contention that different levels of educational expenditures do not affect the quality of education with the statement that "plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true."[55] It is not clear that this approach was consistent with the court's earlier statement that the California procedure is to "treat the

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[52]5 Cal. 3d at 601 n. 16, 487 P. 2nd at 1253 n. 16, 96 Cal. Rptr. at 613 n. 16.

[53]*Id.* The court cited McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969), in which a 3-judge federal court stated, without a supporting citation, in the course of rejecting a constitutional attack on interdistrict differentials in school financing, "[p]resumably, students receiving a $1000 education are better educated that [*sic*] those acquiring a $600 schooling." 293 F. Supp. at 331.

In another case cited in *Serrano*, Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated on other grounds per curiam sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971), the district court stated: "[I]t may be that in the abstract 'the difference in dollars available does not necessarily produce a difference in the quality of education.' But this abstract statement must give way to proof to the contrary in this case." 313 F. Supp. at 947. No proof on this issue, however, was ever stated by the court in *Hargrave* and the opinion goes on not to discuss this, but to discuss the inability of school districts to raise school revenues under the Florida system.

[54]327 F. Supp. 844 (D.D.C. 1971).

[55]5 Cal. 3d at 601 n. 16, 487 P. 2d at 1253 n. 16, 96 Cal. Rptr. at 613

demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'"[56] The court did not explain why, for example, the possibility of a causal relationship between expenditures and educational quality would not be considered a contention of fact. More significantly, the reliance on this procedural posture, if this is what the court did, means that the issue still remains open for proof—proof that does not appear to be available.

The authors of *Private Wealth and Public Education,* in enunciating the equal wealth standard, try to finesse the problem by stating the issue as equality of resources available to the student rather than as equality of educational offerings. What is available, they then contend, are the goods and services purchased by school districts, and there is no reason to assume that the money spent for these goods and services is not the appropriate measure of their value.[57]

The problems may also be avoided in terms of burden of proof. When *A* shows that the state is spending more money on *B* than on him, the state must respond by demonstrating either that this fact is irrelevant because *A* is not really receiving less than *B,* or that even if *A* is receiving less, the differential is still constitutionally permissible. Available data are insufficient to support a state's assertion that expenditures are irrelevant to educational equality and thus the issue shifts to

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[56] *Id.* at 591, 487 P.2d at 1245, 96 Cal. Rptr. at 605.

[57] PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22, at 25-27.

a determination of the constitutionality of differential treatment. This burden of proof approach to the issue was apparently the one taken by Judge Wright in the latest decision of *Hobson v. Hansen*,[58] although there were also elements of estoppel involved in the *Hobson* court's reliance on the school administration's own assertions of a correlation beteen educational resources and quality of education.[59]

While the burden of proof argument has appeal as an expedient solution it is not a completely satisfying basis for judicial invalidation of a longstanding method of public school financing. From this perspective, arguments for judicial action must be discounted somewhat by uncertainty about the present system's detrimental effect on the quality of education, and also therefore, by doubts of improving education by such invalidation.[60]

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[58]327 F. Supp. 844, 854-55. The court in *Hobson* was not concerned with a correlation between gross expenditures and quality of education, but rather with the specific differences in expenditures on teacher salaries, rated on a per pupil basis, between essentially "white" and "black" schools within the District of Columbia. The quality-expenditure issue in terms of teacher salaries per pupil was posed as the correlation or lack thereof between quality instruction and higher salaries. Phrasing the issue as "teacher salary per pupil" also raised the issue of the relationship between educational quality and class size or student-teacher ratio.

[59]*Id.* at 855.

[60]Professor Moynihan has suggested that:

> [t]he only certain result that will come from [a rise in educational expenditures, which he states *Serrano* will produce] is that a particular cadre of middle-class persons in the possession of certain licenses—that is to say teachers—will receive more public money in the future than they do now.

Moynihan, *Can Courts and Money Do It?*, N.Y. Times, Jan. 10, 1972, §E (Annual Education Review) at 24, col. 1. Note that by ordering equalization of teacher salaries per pupil between "white" and "black" schools, Judge Wright in Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971), allowed the school district the choice of transferring higher paid teachers from "white" schools to "black" schools or reducing the student-teacher ratio in the "black" schools. Although the evidence of correlation between class size and pupil

B. *The Relationship of Poor Districts to Poor People*

The second question raised by the wealth analysis underlying the *Serrano* holding centers on the supposed relationship between a school district's wealth, as measured by its real estate tax base, and the personal wealth of its people. For its wealth classification argument the court relied on United State Supreme Court "de facto wealth classification" cases in which states have been restricted in imprisoning indigents for failure to pay fines,[61] have been required to provide indigent criminal defendants with such things as transcripts[62] and attorneys for appeal,[63] and have been precluded from requiring the payment of a poll tax as a precondition to voting.[64] All of these cases, however, involved "wealth classifications" that operated against individuals, whereas *Serrano* involved school districts. The issue in *Serrano* would therefore be simpler if the wealth of school districts coincided with the wealth of its people, thus making poor districts aggregates of poor individuals.

Available statistics, however, do not indicate this hypothesized relationship between poor districts and

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performance does not seem significantly greater than that between average teacher salary and pupil performance, one's subjective sense is that the class size is the more significant factor to education. Both the intradistrict and racial aspects of *Hobson* also strengthened the case for judicial intervention.

[61]Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971).

[62]Griffin v. Illinois, 351 U.S. 12 (1956).

[63]Douglas v. California, 372 U.S. 353 (1963).

[64]Harper v. State Bd. of Elections, 383 U.S. 663 (1966).

poor people. One recent study of 223 school districts in eight states indicates that there is no substantial pattern of differences in real estate tax basis per pupil among seven categories of school districts: major urban core cities, minor urban core cities, independent cities, established suburbs, developing suburbs, small cities, and small towns.[65] It is true that the three-judge federal district court which invalidated the Texas school financing system in *Rodriguez v. San Antonio Independent School District* found that "those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income . . . ."[66] The basis for this finding was an affidavit submitted by plaintiffs and cited by the court. As a basis for the court's conclusion, this was a questionable source; a careful reading of the data contained in the affidavit creates grave doubts about the validity of its conclusions.[67]

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[65]*See* ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION 83-89 (1971) (National Educational Finance Project vol. 5).

[66]337 F. Supp. at 282 (W.D. Tex. 1971).

[67]The *Rodriguez* court cited the affidavit as showing a median family income of $5900 in the 10 districts with the highest tax base per pupil and $3325 in the 4 districts with the lowest tax base per pupil. *Id.* at 282 n.3. The following are the study's figures:

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	State & Local Revenues Per Pupil
Above $100,000 (10 Districts)	$5900	8%	$815
$100,000-$50,000 (26 Districts)	4425	32	544
$50,000-$30,000 (30 Districts)	4900	23	483
$30,000-$10,000 (40 Districts)	5050	31	462
Below $10,000 (4 Districts)	3325	79	305

In the amicus brief filed in *Serrano* by the Harvard Centers for Educational Policy Research and for Law and Education, an attempt was made to avoid the absence of statistics correlating poor people and poor school districts, by defining the injured class as those poor people who also live in poor school districts.[68] Although the amicus brief never explains the basis for this definition of the injured class, it may be argued that the people in this narrow group are singularly disadvantaged because they have neither the advantage of a high tax base as do the poor in rich districts, nor the mobility[69] and private school alternatives of the more wealthy residents of poor school districts. The flaw in this approach is that defining the injured class in these terms considerably weakens the wealth classification argument. The system no longer can be said to discriminate against the poor but only against a certain segment of the poor. In fact, when the school finance system is viewed from this perspective, the chief beneficiaries of the system when the class is so defined

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Affidavit of Joel S. Berke at 6 (footnotes omitted).

The 5 category breakdown of school districts seems to be arbitrary, and it is only this breakdown which appears to produce the correlation of poor school districts and poor people. Even on this breakdown, however, the correlation is doubtful. Note the very small number of districts in the top and bottom categories. Even more significant is the apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall. While the family income differences among the 3 groups of districts are small, they may be even more significant if categories are weighted by the number of districts in each. At the very least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiant; this is, however, the study the court relied upon, and it is apparently the only study which purports to show such correlation.

[68]Brief for the Center for Educational Policy Research and the Center for Law and Education as Amici Curiae at 3 n.1.

[69]*Id.* 6 n.5.

would be those poor families who live in rich districts. Not only do they have a resource advantage over those who live in poor districts, but also, they get more school for fewer tax dollars than do their more wealthy neighbors in the rich districts. The relative advantage of the poor in rich districts is further increased by the very factors that arguably are the unique disadvantage of the poor in poor districts—their lack of mobility and private school alternatives. As with the wealthy in poor districts, the wealthy in rich districts are not as dependent on their district's public schools as their less affluent neighbors and thus not as benefited by living in a rich district under the present system.

Finally, to focus on aiding the poor who live in poor districts would probably require greater relief than that offered by *Serrano* and the subsequent cases. Under this analysis, the poor in districts that undervalue education under such equal wealth alternatives as district power equalizing would be just as disadvantaged as the poor who live in poor districts today. Their immobility and lack of private school alternatives would still uniquely disadvantage them as compared to the wealthy inhabitants of the same districts, and the poor in districts with greater school expenditures. A focus on the poor in poor districts would, therefore, require equalization of expenditures to avoid the hypothesized legal wrong.

Another complication in applying a district wealth classification theory is that any correlation that does exist between poor school districts and poor people

may vary from state to state. Also, it is quite possible that there is a greater correlation between the rural poor and poor school districts than there is between the urban poor and poor school districts. If this correlation is necessary to the legal analysis, the legitimacy of the *Serrano* result might very well vary from state to state. A decision by the United States Supreme Court, however, attempting to differentiate among the states, would be entirely inappropriate. It would be most unwise to have basically similar state systems held invalid or valid depending on where the state's poor lived, or more accurately, depending on judges' views of the difficult statistical analysis demonstrating a correlation between poor people and poor school districts.

A related failure to demonstrate a relationship between blacks or other racial minorities and poor districts is particularly disappointing to proponents of judicial action for whom the presence of such correlation would have significant legal effects.[70] One report notes that in California, over half the minority pupils reside in districts with above average assessed wealth per pupil.[71]

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[70] *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), in which statistical evidence of discriminatory distribution of municipal services along racial grounds triggered a "compelling state interest" test.

[71] PRIVATE WEALTH AND PUBLIC EDUCATION, *supra* note 22, at 356-57 n.47. The complaint in *Serrano* alleged that "[a] disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided." 5 Cal. 3d at 590 n.1, 487 P.2d at 1245 n.1, 96 Cal. Rptr. at 605 n.1. Other than quoting this allegation as part of the complaint, however, the California court did not rely on it.

The affidavit relied on by the court in *Rodriguez*, 337 F. Supp. at 282

The absence of a correlation between poor or racial minorities and poor districts may be attributable to, among other factors, the failure of the property tax as a measure of a man's actual wealth. Most significantly, however, the reason for the absence of correlation is the location of industrial and commercial property, the presence of which increases a district's wealth by increasing its tax base, without a necessary increase in school population.

These facts raise a basic question of the effect of *Serrano* and its progeny. While the case has been hailed on theoretical egalitarian grounds, many of its proponents are more concerned with the practical problem of getting more money for urban education. While some major cities with high concentrations of poor people are financially poor school districts, others, such as New York, San Francisco, and Philadelphia, have relatively high tax bases as compared to their respective state averages.[72] They also spend more per pupil than their respective state averages. Therefore, if current expenditures for education were equalized on a statewide basis, major cities in many areas would have

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n.3 (*see* note 67 *supra*), however, did state that, of the districts sampled in Texas, the richest districts had 8% minority pupils while the poorest districts had 79% minority pupils. Again, however, the validity of this conclusion based on the study's figures is doubtful. The "correlation" only exists for the 10 richest and 4 poorest districts. This pattern disappears in the middle groups which include 96 of the 110 districts. Whatever correlation there is between the percentage of minority people and the tax base wealth of a school district in Texas may reflect the rural nature of Texas minority life or some other state peculiarity.

[72]Another reason, in addition to the presence of industrial and commercial property, for the absence of correlation between major cities and poor districts may be the relatively large number of students in urban areas attending nonpublic schools.

less money to spend than they have now.[73] The same would be true if wealth were equalized with tax rates remaining the same.

It is possible that equal wealth systems may, by their nature, result not just in equalization of current expenditures but also in over-all increased spending for education. It may be that under a scheme of centralized financing it would be politically easier for state legislatures to raise taxes, and thereby increase total school expenditures, than it would be for local school board members. The latter are more visible to the taxpayer and may, indeed, have to get voter approval for tax increases or bond issues. Under district power equalizing Professor Brest suggests that, because it is politically impossible for legislators to vote to take locally collected taxes away from a district, tax rate and expenditure levels would have to be equalized at the highest figures previously available—that is, what the wealthiest district produced from its tax rate.[74] The consequence of this would be enormous increases for

[73]An equalization principle that operated beyond the sphere of property tax base wealth could work against the cities in another area. Local nonproperty taxes, though limited in significance to a few states, *see* note 23 *supra*, may also disproportionately favor urban centers. In a study of Alabama, Kentucky, Louisiana, Maryland, New York, Pennsylvania, and Tennessee for 1968-1969, school districts were classified into central city, suburban, independent city, and rural districts. It was found that in 5 of the 7 states (Kentucky, Louisiana, Maryland, Pennsylvania, and Tennesseee) the rural districts received the least amount of revenue per pupil from such local nonproperty taxes; in 4 of the 7 states (Kentucky, New York, Pennsylvania, and Tennessee) the central city districts received the most revenue per pupil. The average ranking for the 7 states showed that the central city school districts on the average received the most revenue per pupil from local nonproperty taxes, followed in order by suburban, independent city, and rural districts. ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION 186-87 (1971) (National Educational Finance Project vol. 5).

[74]Brest, Book Review, 23 STAN. L. REV. 591, 596 (1971).

education. So enormous, in fact, that Professor Brest uses it to demonstrate the improbabilty of any state ever adopting district power equalizing.

Despite these hopes for a greater investment in education, the history of state legislative treatment of urban education, the serious economic difficulties currently facing state government, and the domination of state governments by r u r a l and suburban interests make it difficult to realistically predict that *Serrano* will result in greater total expenditures for education. And if total expenditures do not increase, then the cities, in their relatively wealthy status stand to gain little from the *Serrano* decision.[75]

C. *"Wealth Classifications" as Applied to School Districts*

In addressing the problem of correlating poor people and poor school districts in its legal analysis, the California Supreme Court first relied on the procedural posture of the case and noted again that the complaint alleged a correlation between poor people and poor districts.[76] The court did not quote the complaint nor state the basis, if any, given for the allegation. The

[75]It may aid rural education which would help the rural poor. It may also be argued that, when relieved of the obligation of financing education, by the adoption of a centralized financing scheme for education, urban areas will be more able to raise greater revenues for their other needs. This assumes either that the state financing scheme will not take the same revenue that the urban areas now take for education, or that taxpayers will be more responsive to local taxation for other needs if their education taxation goes to the state. Such assumptions appear unrealistic; present indications are that statewide financing for education will continue to be based on the same real property tax as that on which local taxation presently is based.

[76]5 Cal. 3d at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612.

court did not rest on this procedural argument, however, but went on to state:

> More basically, however, we reject defendants' underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing."[77]

There are, however, serious problems with this application of the wealth discrimination cases to government entities, as distinguished from individuals. Since district wealth is measured by the real estate tax base, and the development of a district's real estate is a variable factor, the possibility of voluntary "poverty" is more acute for government entities. Throughout the opinion, the court assumed that a district's wealth was a "fortuitous" given, beyond a district's control, and not subject to voluntary choice.

While this may generally be correct, it is increasingly true in our environmentally conscious age that

[77] *Id.* at 601, 487 P.2d at 1252-53, 96 Cal. Rptr. at 612-13 (footnote omitted).

a rural or suburban district might voluntarily exclude industrial or commercial development that would increase its wealth by increasing its tax base, without a corresponding increase in its school population.[78] Under centralized school financing this district would not be deprived of school revenues, because revenue would be independent of local decisions affecting the tax base. Under an equal wealth alternative, such as district power equalizing, a decision to exclude new development would likewise not affect revenues, which would be based on a district's choice of tax rate, not wealth. Yet this choice would be logically indistinguishable from the choice of tax rates, with its corresponding benefit or detriment to the district's school revenues, permitted, and indeed encouraged by district power equalizing.[79]

Perhaps it is desirable that districts be able to choose to remain at a low level of wealth without adversely affecting school revenue. This would have the beneficial effect of freeing a locality from the obligations of economic development, thus benefiting the area ecologically. On the other hand, it may be unfair to treat bucolic areas that choose not to expand rapidly

[78]School districts, as special function governmental units, rarely are delegated powers broader than those necessary to administer the school and raise funds by taxation and bond issues. General function units, such as municipalities and townships, are usually the smallest entitles delegated the power over development suggested in the text. Yet, to the extent that general function units coincide with school districts, or to the extent that the smaller units have significant political power within the general unit, one may accurately speak of school district political choices.

[79]Some practical differences, of course, are that a tax rate choice can be redetermind on a periodic basis, is unambiguous, and is clearly visible; whereas wealth choices have more enduring consequences, may be ambiguous as to their basis, and of low visibility.

the same as highly developed areas that have attendant congestion, pollution, and other problems that create a heavier tax burden for the urban dweller. Additionally, widespread decisions not to allow local development could seriously undermine a program of decentralization of industry and commerce. These economic and social effects of *Serrano* obviously need more exploration than the courts and commentators thus far have offered.

The wealth classification precedents employed by the *Serrano* court present another problem. The principle contained in this group of United States Supreme Court precedents is ambiguous. In the criminal procedure cases the Supreme Court required the free provision of transcripts[80] and attorneys[81] on the basis of the indigency of the accused[82] On the other hand, the Court struck down the use of the poll tax as a precondition to voting in all cases, without regard to financial ability to pay the tax.[83] The United States Supreme

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[80]Griffin v. Illinois, 351 U.S. 12 (1956).

[81]Douglas v. California, 372 U.S. 353 (1963).

[82]*See also* Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971), relieving only indigents of the penalty of imprisonment because of their inability to pay fines; Boddie v. Connecticut, 401 U.S. 371 (1971), relieving only indigents of the obligation to pay court fees and costs incidental to a divorce proceeding.

[83]Harper v. State Bd. of Elections, 383 U.S. 663 (1966); *see* Lindsey v. Normet, 40 U.S.L.W. 4184 (U.S. Feb. 23, 1972), in which the Court held unconstitutional an Oregon statute that required a tenant appealing an eviction judgment to post a bond for twice the rental value of the premises from the commencement of the action in which the judgment was rendered until the final judgment on appeal. In so holding, the Court invalidated the high bond requirement for all tenant-defendants, regardless of their ability to pay the bond.

See also Bullock v. Carter, 40 U.S.L.W. 4211 (U.S. Feb. 24, 1972), concerning the validity of high filing fees for entry into Texas nominating primaries. The decision is ambiguous as to whether the Court held the system unconstitutional as applied to all candidates, including those who could raise

Court has subsequently cited these cases indistinguishably as "de facto wealth classifications," without apparent recognition of the difference between saying that no one can be made to pay for a given service, and saying that one who cannot afford to pay for a given service cannot for that reason alone be deprived of it."[84]

The former formula of requiring no payment from anyone has the advantage of encouraging all—rich, poor, and in-between—to avail themselves of the service. This is the aim, for example, of free public education and, perhaps, the reason for voiding the poll

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the high fees, or only held that those who, because of their indigency, could not raise the high fees had to be relieved from doing so. The Court did stress the issue of the "inability" (without defining the term) of some candidates to pay the fee and thus indicated that it could be constitutionally permissible for Texas to maintain its general fee system and except only those with this "inability."

[84]Professor Frank Michelman, in his article, *supra* note 40, cited by the *Serrano* court, has argued persuasively that these cases are better understood as substantive due process "minimum protection" cases rather than as equal protection cases. The distinction between "minimum protection" and "equal protection" is set forth by Michelman as "vindication of a state's duty to protect against certain hazards which are endemic to an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment," *Id.* 9 (emphasis omitted). Minimum protection thus means state fulfillment of those just wants (or fundamental rights) that our society cannot constitutionally accept as being subject to normal market risks of nonsatisfaction. This changes the focus of inquiry from "wealth classification" to the determination of what are just wants and what is meant by their nonsatisfaction.

Justice Harlan adopted the Michelman approach in his concurring opinion in Williams v. Illinois, 399 U.S. 235, 259 (1970), and employed it for the Court in Boddie v. Connecticut, 401 U.S. 371 (1971) over the objection of Justice Douglas. Justice Harlan's attempt to shift the Court to the Michelman due process approach has apparently been unsuccessful. *See* Bullock v. Carter, 40 U.S.L.W. 4211 (U.S. Feb. 24, 1972).

In discussing the minimum protection thesis, Professor Michelman notes the difference in treatment discussed in the text between the poll tax and criminal procedure cases. H does not, however, appear to offer a rationale for this difference. Michelman, *supra* note 40, at 24-26. He suggests that under his minimum protection theory, the state's obligation is normally satisfied "by free provision to those and only to those who cannot satisfy their just wants out of their own means." *Id.* 26. Nor would his theory require a graduated schedule of payments above the indigency threshold. Justice Harlan in his concurring opinion in *Williams v. Illinois* pointed out that logical consequence of the Court's equal protection theory would require a graduated schedule of payments for those above the indigency level. 399 U.S. at 261.

tax as a prerequisite for voting. On the other hand, an exemption from payment only for the poor results in a greater redistribution of wealth than does a no-payment principle.

To view the problem only in terms of those who can pay all or those who can pay nothing is also to oversimplify. One basic prerequisite is a determination of what level of sacrifice is required before one can say that a given individual or group is "unable" to pay for a service. Again, the leading cases have not dealt with this pervasive problem. Perhaps the level of sacrifice required of an individual can also be related (inversely) to the degree that society desires that everyone avail himself of the service; that is, the more society wants the service used, the less sacrifice is required for it.[88] Even this formula may need reevaluation to the extent that sacrifice is also considered to be a significant measure of the value of a service to an individual and recognition of that value by the individual increases the societal result desired.

The ambiguous result presented by the individual wealth discrimination cases is compounded when applied, as in *Serrano,* to an aggregation of individuals —a school district. In this setting, level of sacrifice may become useless as a guideline for determining when to apply the no-payment principle. Governmental

[88] Under Professor Michelman's theory, Michelman, *supra* note 40, absent the "remote" possibility that one might deliberately waive his claim to the satisfaction of a just want, a person is always entitled to satisfaction of his just wants regardless of the sacrifice he is or is not willing to make to attain such satisfaction. *Id.* 14. He does not, however, satisfactorily explain why this is so.

units may have a greater array of demands on resources than do individuals; districts may be able to reallocate priorities in a way that individuals cannot. Arguably, street cleaning or hospital construction can always be cut back to pay for education. More significantly, a poor district's ability to raise its taxes or create revenue through borrowing may be so much greater than the ability of a poor person to raise revenue that the issue of level of sacrifice becomes meaningless.

The California Supreme Sourt recognized the difficulty of deriving from the wealth classification precedents a rule that, as applied to districts, would define the limits of sacrifice—determine which districts could not, and therefore need not, pay. One response by the court was to assert that "as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts."[86] The authority given for this statement was an unquoted reference to a Legislative Analyst study. The court, rightly, was unwilling to rest on that.[87] Rather, it relied primarily on the proposition

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[86]5 Cal. 3d 599-600, 487 P.2d at 1251, 96 Cal. Rptr. at 611.

[87]Under the California financing system there is no limit on the rate at which, with voter approval, a district can choose to tax itself. Thus, there is no legal limit on a district's ability to raise its revenue. This may be contrasted with the situation in Florida which was presented to a 3-judge court in Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated on other grounds per curiam sub nom.* Askew v. Hargrave, 401 U.S. 476 (1971). Florida, in its "Millage Rollback Act," provided that, in order to qualify for state subvention, a school district could not tax itself at a rate greater than 10 mills. The district court accepted the argument that this limit was invalid because it put a limit on tax rates (or penalized districts for high rates), thus precluding school districts with lower tax bases from producing the same revenue as those with higher bases. The district court invalidated this limit on the grounds that there was no rational basis for it. In this the court was

that even if poorer districts could achieve expenditure parity by higher tax rates, "the richer district is favored when it can provide the same educational quality for its children with less tax effort."[88]

This statement suggests, that as applied to districts, the evil to be cured is not merely absolute deprivation, but relative disadvantage in ability to pay. This theory goes well beyond the de facto wealth cases that relieved only indigents of the obligation to pay for certain services.[89] Obviously, within the nonindigent category, the wealthier can purchase the service with less effort than the less wealthy. But the precedents do not require free provision of services to all or graded fees based on the ability to pay of those above the indigent cutoff line.

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patently in error. The state does have a rational purpose in preserving its own sources of revenue and protecting the taxpayers from overtaxation by their local school districts.

The court did accurately recognize, however, that the limit meant that districts with lower tax bases could not, even by taxing themselves more, equalize school expenditures with wealthier tax base districts. Yet, there is a paradoxical effect here. Florida argued in the United States Supreme Court that the limit was intended to be, and was, equalizing in a way that benefited poorer school districts. It had this effect, because for each percentage increase in tax rate, the wealthier district could produce more dollars per pupil than the poor one. To illustrate this, consider the hypothetical case of 2 school districts, *A* with $100,000 assessed valuation per pupil and *B* with $50,000 assessed valuation per pupil. If a 1.0% limit were put on both *A* and *B*, *A* could produce $1000 per pupil and *B*, $500, a difference of $500. By contrast, if there were no limit, and both *A* and *B* taxed at 1.5%, *A* would have $1500 and *B*, $750, a difference of $750, and so on. Thus, while holding *A* down, the limit also holds down the possible dollar divergence between *A* and *B*.

The Supreme Court vacated and remanded the case, on the question of whether the district court should have refused to exercise jurisdiction under the abstention doctrine.

[88]5 Cal. 3d at 599, 487 P.2d at 1251, 96 Cal. Rptr. at 611.

[89]It would also go beyond the court's apparent limitation of Proposition 1 to cases in which there are expenditure differentials, and underlines the taxpayer orientation of Proposition 1. *See* note 28 *supra*.

When applied to school districts, a constitutional standard of graded ability to pay becomes an even greater innovation than if it were applied to individuals. When dealing with school districts we are dealing with *taxation*. Let us assume, for example, equal spending per pupil among school districts. Each school district raises its required revenue by dividing its expenditure total by the number of its inhabitants (or the number of its families). It then assesses each inhabitant (or family) a per capita share of the total revenues required and levies a tax accordingly. If the state is redistricted so that aggregate individual wealth of each district is the same, the system clearly would not violate the *Serrano* holding because no school district, *qua* district, would have to make a greater effort than any other to raise the required revenues. Nevertheless, is this the relevant issue?

Burdens of taxation fall not on school districts, but on taxpayers. Even though districts are equalized in wealth consistent with *Serrano,* individuals or families are not. It would make no difference to the poor taxpayer who had difficulty meeting his tax burden, that there were an equal number of poor people with the same difficulty in other school districts. If the school districts in the example did v a r y in the aggregate wealth of their residents this system might violate *Serrano;* one could say that it was easier for the school district with greater aggregate wealth to raise its revenue than for the poorer one to do so. This approach still misses the point. The real problem is the individ-

ual taxpayer's difficulty in paying his tax bill. If *Serrano* labels relative deprivation among districts unconstitutional, then does its logic not require elimination of disproportionate sacrifice among those who pay the tax? Does the former proposition even make any sense without the latter?

If there is a constitutional vice created by the differential ability of taxpayers to meet their obligations, does this then mean that proportional, or even progressive, taxation is constitutionally compelled? It is doubtful that the *Serrano* court meant to suggest this outcome.[90] Nevertheless, without such a conclusion it is difficult to understand why it is unconstitutional to have a system whereby one district can more easily raise revenue than another. It is indeed probable under present financing systems, including that of California, that the average resident of a rich district pays higher taxes, in terms of gross dollars, for his schools than does the average resident of a poor district, despite the fact that the resident of the rich district is taxed at a lower rate.[91] This may be the result of the

[90]The complaint contained counts by both students and parent taxpayers. The court's entire analysis was directed to the student plaintiff count, however. In addressing itself, at the end of the opinion to the dismissal of the taxpayer count, the court did not discuss the independent claims of the taxpayers, *qua* taxpayers, that, being in a poor district, they were required to pay taxes at a higher rate to secure the same or less educational expenditures. It reversed the dismissal of the taxpayer count solely on the basis that the taxpayer plaintiffs had incorporated the unequal education allegations of the student plaintiffs into their count, and that, under California law, they had standing to assert the students' educational interests. 5 Cal. 3d at 618, 487 P.2d at 1265, 96 Cal. Rptr. at 625.

[91]In addition, taxpayers might very well be paying for the education of their children in the prices they pay for their homes, as well as in their tax payments. To the extent that the quality of education in a given district is disproportionately high in relation to real estate taxes paid by the home owners of the district, this fact should be reflected in the price of the district's homes.

higher assessed valuation and, perhaps, larger average property holdings of the individual taxpayers in the rich district. A correlation may even exist between the amount of tax dollars paid by the average resident of a district and the educational expenditures of that district. If this is so, the difficulty is not with disproportionate payments but with inequitable taxation, not only in the hypotheticals above, but also in the existing financing schemes. The logic of *Serrano,* which invalidated these existing financing schemes, may therefore require the wealthy taxpayer to bear a greater burden than just having to pay more tax dollars than the poor. Instead it may demand at least a proportional tax system, and possibly one that is progressive.

The difficulties of relating the wealth of individuals to the wealth of districts, of applying wealth classification precedents to districts, and of finding a logical stopping place for the equality concepts involved, are not the only problems with the wealth classification analysis of *Serrano v. Priest.* In fact, the entire foundation of the court's constitutional argument may well have been destroyed by a United States Supreme Court decision which the *Serrano* court disturbingly ignored. In *James v. Valtierra*[92] the Supreme Court implied that even the existence of "invidious classifications on the basis of wealth" are insufficient to trigger the compelling interest standard of the new equal protection.

In *Valtierra,* the Supreme Court upheld a California constitutional provision that no low-rent housing

[92] 402 U.S. 137 (1971.)

project could be constructed by a state public body unless the project had been approved by a majority of those voting at a local election. Refusing to apply strict scrutiny, the Court upheld the mandatory referendum on the ground that it was rationally related to the legitimate purpose of achieving popular participation in expenditure decisions. Justice Marshall, in a vigorous dissent, noted that the mandatory referendum provision discriminated solely against the poor. "Publically assisted housing developments designed to accommodate the aged, veterans, . . . or any class of citizens other than the poor, need not be approved by prior referenda."[93] Nevertheless, the Court ignored *Douglas, Harper,* and other cases that had deemed wealth classifications or discriminations against the poor as inherently suspect.[94] The *Valtierra* decision casts an unavoidable shadow over the first half of the constitutional analysis employed in *Serrano v. Priest.*

III. Education: A Fundamental Interest?

A. *Relationship Between Fundamentality and Impairment of an Interest*

The inherently suspect wealth classification argument is only one-half of the California Supreme Court's constitutional attack on school financing. The court also relied on its conclusion that education is one of those fundamental interests that, when conditioned on wealth classifications, will trigger special scrutiny

[93] *Id.* at 144 (footnote omitted).
[94] *See* notes 61-64 *supra.*

requiring a compelling state interest. The court concluded that education is a fundamental interest based on its importance, and its similarity to interests previously held to be fundamental. The court's analysis proceeded on the unstated assumption that having already found a suspect trait—wealth classification—if it is determined that education is fundamental, then the system of education financing here involved must meet a compelling interest test to survive constitutional scrutiny. This analysis was developed, however, without any attempt by the court to correlate the various reasons for determining education to be fundamental with the constitutional vice here perceived, unequal educational expenditures based on differential tax bases among school districts.

The *Serrano* court seems not to have perceived this as an issue at all. It was not an issue in the criminal process and voting cases decided by the United States Supreme Court and discussed above,[95] because those were cases of total deprivation of the service involved. When the effect of state action is total deprivation of the service to the individual, whatever fundamental aspects of the service exist are necessarily eliminated.[96] On the other hand, where a service is only impaired

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[95] *See* notes 80-84 *supra* & accompanying text.

[96] It may be possible for a service to be held fundamental based solely on general societal benefit or externalities unrelated to any particular individual enjoying it. Because society's interest would be in the level of the service enjoyed by people in the aggregate, arguably this interest would not be impaired by inequality among society's components. If this were so, a total deprivation limited to a number of individuals might not impair the bases of fundamentality. This would seem, however, to be a very rare situation of fundamentality, and has not yet arisen in any litigation.

rather than total withheld, it would seem necessary to determine whether or not the impairment does affect the basis of the fundamentality of the service.

As an illustration, assume that a state decided to provide all students with free education only through eighth grade, and thereafter to charge fees so that only those who could afford to pay could attend. In analyzing this hypothetical in terms of the fundamentality of education, one might conclude that all the attributes of education that make it fundamental are satisfied by attendance only until eighth grade. If that were so, the fundamentality of education would be irrelevant to the constitutionality of any state decision on post-eighth grade education. In the context of *Serrano,* such an analysis would require determination of the relationship between the various grounds for the court's conclusion that education is fundamental, and the inequalities of interdistrict expenditures based on differences in taxable wealth among districts.

B. *Is Education a Fundamental Interest?*

In its analysis of education's fundamentality, the California Supreme Court first recognized that there was no direct authority for the proposition that education is such a fundamental interest.[97] The court then went on to make three basic arguments for the fundamentality of education, based on:

1. the importance of education to the individual and society;

[97] 5 Cal. 3d at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.

2. a comparison of education with the rights of criminal defendants and voting rights that have been held to be fundamental; and

3. the distinguishing of education from other governmental functions that might arguably be as fundamental as education.

1. The "Importance of Education" Argument

The court first argued for the fundamentality of education because it is "a major determinant of an individual's chances for economic and social success in our competitive society; . . . [and] a unique influence on a child's development as a citizen and his participation in political and community life."[98] In support of these statements the court did not cite any social science data but rather relied on language in prior cases, principally the well-known statements in *Brown v. Board of Education*[99] concerning the importance of education in today's world.

As stated above, however, the court did not relate these attributes of education to the effect of interdistrict disparities in expenditures. Its only reference to the issue was an assertion that, while California precedents "involved [only] actual exclusion from the public schools, surely the right to an education today means more than access to a classroom."[100] For com-

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[98] *Id.* at 605, 487 P.2d at 1255-56, 96 Cal. Rptr. at 615-16.

[99] 347 U.S. 483, 493 (1954).

[100] 5 Cal. 3d at 607, 487 P. 2d at 1257, 96 Cal. Rptr. at 617 (footnote omitted).

parison the court quoted language in *Reynolds v. Sims*,[101] where the Supreme Court asserted that the right to vote is impaired not only by bars to voting but by dilution of power by malapportionment. *Sims*, however, is not relevant to the issue posed. The real issue in the voting case concerned individual political power, an interest clearly and directly impaired by the evil to be remedied—malapportionment. There is no a priori clear connection between those characteristics of education quoted above by the court to establish its fundamentality, and financing differentials; nor do existing data show such a connection.

In terms of an individual's social and economic success, there are data, although hardly incontrovertible, correlating length of school attendance and economic attainment.[102] However, such data do not correlate economic or social attainment with differential expenditures and, as indicated above, the whole issue of correlating economic inputs and educational outputs is, at best, unclear. As to responsible citizenship there again are no empirical data to show a correlation with differential expenditures. One's a priori judgment here might be that there is no such correlation.

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[101] 377 U.S. 533, 562-63 (1964).

[102] *See* EDUCATIONAL INVESTMENT IN AN URBAN SOCIETY (M. Levin & A. Shank eds. 1970), which contains summaries and analyses of a number of studies.

2. Education Compared to Previously Recognized Fundamental Rights

The second part of the court's argument that education is fundamental was a comparison of education with those rights the United States Supreme Court already has held to be fundamental: various rights of criminal defendants and voting. The court recognized the uniqueness of an individual's interest in liberty which operates in the criminal procedure area, but suggested that education might well be as important because it has "far greater social significance than [such procedural protections as] a free transcript or a court-appointed lawyer."[108] Except for an aside that education may reduce the crime rate, however, the *Serrano* court did not really try to equate education with the rights of criminal defendants. Nor should it. The protection of the procedural rights of criminal defendants is not solely recognition of a unique right to liberty but a recognition of the need for protection against the ultimate state attempt to curtail that liberty. The individual, in classic terms, is defending himself against the state. This protection of citizen from government is the essence of the constitutional restraints contained in the Bill of Rights and the fourteenth amendment. Unlike the state's function of giving children an education, in the criminal process cases the state fulfills its function by taking something—the liberty of the criminal. Thus these cases do not support

[108] 5 Cal. 3d at 607, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

the proposition that there are fundamental affirmative rights to the provision of government services.

The right to vote is an affirmative right ensured by the state; it is, however, the ultimate political right in a democratic society in a way that makes it sui generis. Voting ensures the right to all other rights—including education—to the extent achievable through the political process. Public education, though certainly relevant to political access, is not intrinsic to democracy. Finally, the most obviously distinctive fact about both criminal procedural safeguards and voting is that they find expression in the structure of the Federal Constitution in a way that education does not.[104]

3. Education Compared to Other Government Functions

In addition to extolling education and comparing it with acknowledged fundamental rights, the court in *Serrano* felt compelled to distinguish education from other services and interests. This ability to find education unique is central to its fundamentality. If everything is fundamental, nothing is. Moreover, the uniqueness of education is an essential limitation on the holding in the case. The court was most anxious to refute the argument that if differences in spending on education attributable to wealth differentials among geographical areas are unconstitutional, then so are similar differentials in other governmental services.

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[104] *See* Brest, *supra* note 74, at 606.

In attempting to distinguish education from other governmental services the court relied on five factors:[105]

1. Education is necessary to preserve an individual's opportunity, despite a disadvantaged background, to compete successfully in the economic market place, thus maintaining the existence of "free enterprise democracy."

2. Education is "universally relevant." Every person benefits from education though not everyone finds it necessary to use other governmental services like the police or fire department.

3. Public education occupies much of an individual's youth—between ten and thirteen years. Few government services have such "sustained, intensive contact" with the individual.

4. No other government service molds the personality of society's youth as does education.

5. Education is compulsory.

Again, there is the difficulty of relating these distinguishing features of education to spending differentials. The unproven relationship of educational spending to social and economic success has already been discussed.[106] The universality and prolonged nature of education were used expressly to distinguish it from police and fire services. The universality of *public*

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[105] 5 Cal. 3d at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.
[106] *See* text accompanying notes 98-102 *supra*.

education is overstated, however. Although there are economic limitations on its use, the alternative of private education is available. More significantly, police and fire protection are also universal and sustained. Their protective attributes do not consist solely of responding to cries of distress, but consist also of the security present on a daily, continuous basis in an individual's surroundings. Thus, they cannot be said to be less universal or of a shorter duration than education.

Reasons four and five do distinguish education, at least in degree, from police and fire. This fact does not satify the question of what relationship these factors have to differential expenditures. The major thrust of the argument that education molds personalities and that it does so with the force of governmental compulsion behind it, would appear to be directed not against financing differentials, but against the danger to a free society in having the government effectively control and monopolize this crucial mind forming process. As such it would argue much more for the easier availability of diverse educational experiences, for example, through a tuition voucher system, than for equality of expenditures.[107]

The compulsory nature of education merits further discussion.[108] It was argued that education is funda-

[107]It may be argued that the personality molding function of education is peripherally related to first amendment rights. The difficulties of relating this factor to a need for equal expenditures would still apply to the argument, however.

[108]In assessing the applicability of *Serrano* on a nationwide basis, it should be noted that education is not universally compulsory in this country. Mississippi

mental to the individual because by making it compulsory the state has designated its importance. On analysis, however, this does not seem convincing. The reasons for making education compulsory are two: (1) people might not otherwise avail themselves of this service; and (2) the value of freedom of choice is less applicable here because the choice of school attendance would not be the child's, but his parents'. This latter, parens patriae reason presumes that the state is no worse a decisionmaker for a child than are his parents, and that a state choice of compulsory schooling provides a foundation for later choice by the child.

The first reason, that education is compulsory because otherwise people would not avail themselves of the service, does not primarily demonstrate a judgment of importance to the individual. Indeed, the need to make education compulsory to be certain that all will avail themselves of it might indicate its relative unimportance to the individual; an opposite determination that there is no need to make a service compulsory could reflect the belief that all individuals, recognizing the importance of the service, would use it.

The "importance" reflected in the societal decision to make education compulsory does not represent the value choice of the individual, but rather, of society. It may be that the court was here finding the individ-

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and South Carolina do not have compulsory school attendance laws and Virginia has a local option system. Moreover, compulsory school attendance is generally limited to those between the ages of 7 to 16, whereas one is entitled to attend school generally from ages 6 to 21. *See* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 393-94 n.74 (1969).

ual's interest in education to be fundamental because the external benefits of education are valuable to *society*. The flaw in that approach is that society has already decided what benefits it wants from education by legislative determination; it does not need judicial intervention.

Nor does the second reason for making education compulsory—the parens patriae reasoning—necessarily indicate a judgment of education's unique importance to the individual. Rather, it relates to the peculiar situation of the child, an individual for whom someone else, parent or state, must make a choice.[109]

While the reasons for making education compulsory do not therefore argue that education is fundamental, there remains the significance of compulsory attendance itself.

Initially, it should be remembered that enrollment in public school is not required. The option of private schooling is constitutionally protected.[110] On the other hand, private school is a viable option only for those who can easily afford it, or who feel strong social, political, or religious needs that persuade them to make the sacrifice necessary to pay for private schooling. The *Serrano* court stated that the freedom to attend private schools "is seldom available to the indigent. In this context, it has been suggested that 'a child of the

[109]The validity of these rationales for compulsory school laws has been challenged in the recent decision of State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539, *cert. granted*, 402 U.S. 994 (1971).

[110]*See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

poor assigned willynilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years.' "[111] While this statement embodies some underlying truths, it falls short of persuasiveness when applied to interdistrict differentials in expenditures.

As discussed above, the correlation between expenditure levels and quality of education is unclear,[112] and there is no demonstrated correlation between "a child of the poor" and school districts with low real property tax bases.[113] Moreover, the argument that compelled attendance requires equal expenditures seems to be premised on a type of "right to treatment"—the notion that restriction of freedom for a specified purpose obligates the state to satisfy that purpose.[114] Yet this right would only require a minimum level of treatment to justify curtailing a child's liberty, or more realistically, his parents' liberty. Such a minimum right to treatment may not be in question at all under the California foundation plan guarantee and, if it is, it is subject to the problems discussed above of court determination of the minimum level of a foundation guarantee system. A child compelled to go to a poor school (rather than not compelled to go to school at all) is not hurt by that compulsion vis-a-vis another

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[111] 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619 (quoting from Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 388 (1969)).

[112] *See* text accompanying notes 47-52 *supra*.

[113] *See* notes 65-67 *supra* & accompanying text.

[114] *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); *Symposium—The Right to Treatment*, 57 GEO. L.J. 673 (1969).

child compelled to go to a better school. He is only hurt by that compulsion if that poor school is worse than no school.

In discussing the uniqueness of education, the *Serrano* court, while trying to distinguish education from police and fire protection, did not even consider a comparison between education and provision of the essentials of life, such as food, clothing, and shelter. Such a comparison would seem imperative, for in *Dandridge v. Williams*[115] the United States Supreme Court upheld welfare grant restrictions on a traditional rational basis test, not the compelling interest test employed by the Supreme Court in protecting fundamental interests. This was done despite prior dictum that subsistence was a fundamental interest.[116]

The *Dandridge* opinion does not expressly deny that subsistence is a fundamental interest. Rather, it states that welfare legislation, when not involved with a constitutionally protected freedom such as interstate travel, is not subject to a compelling interest test because it is "a state regulation in the social and economic field . . . ."[117] Whether welfare regulation is not subject to a compelling interest test because it does not involve a fundamental interest or because it does involve economic and social regulation, the result in *Dandridge* creates difficulties for applying a compel-

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[115]397 U.S. 471 (1970).

[116]*See* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969).

[117]397 U.S. at 484; *accord*, Richardson v. Belcher, 404 U.S. 78 (1971).

ling interest test in *Serrano*. It is hard to argue that an affirmative right to education is more important than an affirmative right to subsistence. Education also shares the status of welfare as being primarily an economic and social regulation despite its avowed mind-forming purpose. Most of the reasons given by the *Serrano* court for the fundamentality of education relate to economic or social factors. Moreover, as noted by Professor Brest, "it is not obvious that educational finance systems embody economic judgments that are any less complex, intuitive, and ultimately nonjusticiable than those inherent in welfare legislation."[118]

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[118]Brest, *supra* note 74, at 615. The recent Supreme Court decision in Palmer v. Thompson, 403 U.S. 217 (1971), in which the Court upheld the right of a city to close its municipal swimming pools rather than operate them on an integrated basis, is also relevant to the issue of the fundamentality of education. In so holding, the Court distinguished prior cases refusing to permit a school district to close its schools in order to avoid a desegregation order. The Califor Supreme Court quoted a statement of the majority opinion in *Palmer* distinguishing swimming pools from schools: "Of course that case [a school closing case] did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.' Brown v. Board of Education, *supra* at 493." 5 Cal. 3d at 609 n.26, 487 P.2d at 1258-59 n.26, 96 Cal. Rptr. at 618-19 n.26.

That quotation was taken out of context by the California court, and when the entire case is reviewed, it is clear that the majority opinion and a number of other opinions in the case purposefully refused to draw a distinction between schools and swimming pools that would give greater constitutional protection to the former. The quotation cited above was from a footnote in the *Palmer* opinion in which Justice Black, writing for the Court, sought to distinguish a prior summary affirmance of a lower court decision invalidating Louisiana statutes empowering the governor to close any school ordered to integrate, or to close all schools in the state if one were integrated. The first difficulty with the quotation is that the sentence following it in the *Palmer* footnote stated: *"More important,* the laws struck down in *Bush* were part of an elaborate package of legislation through which Louisiana sought to maintain public education on a segregated basis, not to end public education." 403 U.S. at 221 (emphasis added).

Moreover, the principal school closing case discussed in *Palmer* was Griffin v. County School Bd., 377 U.S. 218 (1964), an opinion by Mr. Justice Black that invalidated school closings in one Virginia district to avoid desegregation while other schools in the state remained open. In distinguishing *Griffin,* Justice Black did not even mention a special status for schools, but rather relied exclusively on other differences between that case and *Palmer,* principally the fact that *Griffin* did not involve a complete shutdown.

In a concurrence, Mr. Justice Blackmum did indicate that he saw a dif-

IV. The *Serrano* Response: An Uncertain Portent for Education and Equal Protection

Serrano's "fundamental interest" analysis of education is doubtful both logically and in terms of Supreme Court authority. Yet one cannot deny education's importance or avoid the conclusion that society must carefully scrutinize its distribution. The moral case is strong for a doctrine of equal educational opportunity that would limit differential treatment of educational entitlement. The questions that arise in adopting *Serrano* and a federal constitutional standard as the remedy for this moral need are not answered solely according to one's view of the importance of education. There remains for studied consideration the wisdom of yielding this role to the courts, and of attempting to cure societal problems with broad constitutional precepts.

The California Supreme Court, finding an inherently suspect wealth classification as well as a fundamental interest in the school financing system, required

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ference between schools and swimming pools. He stated as one of the 3 factors that influenced him in reaching the conclusion that swimming pools could be closed: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." 403 U.S. at 229. While this statement distinguishes schools from swimming pools, it does not distinguish education from police, fire, welfare, or other common municipal services.

Moreover, in their respective dissents in *Palmer*, both Justice Douglas and Justice Marshall rejected any special status for schools that distinguishes them from swimming pools. Justice Douglas stated: "I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant." *Id.* at 239. Justice Marshall also equated schools with swimming pools or golf courses in conceding that a state could close them if it had a proper basis to do so.

that the system's inequities be justified by a compelling state interest. The court was clearly correct in finding that the system, when compared with its equal wealth alternatives, could not withstand this stricter equal protection test. The question remains, however, whether an equal wealth alternative like district power equalizing that still permits geographic disparities can itself survive a compelling interest test. For the reasons stated above concerning the pervasive societal sense that one cannot prevent people from trying to obtain a better education for their children, it is probable that district power equalizing could withstand strict scrutiny. This conclusion, however, is far from certain.[119]

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[119]The equal wealth formulation, which permits district power equalizing, is easiest understood as a constitutional attempt to equalize educational expenditures, with some inequality permitted as an accommodation to other interests. This is the equal protection formulation discussed in the text above, and used by the *Serrano, Van Dusartz* and *Rodriguez* courts.

One could argue for the equal wealth standard independently of equalization of expenditures, however. Such an argument would have to support a constitutional norm that each student, or each taxpayer, is entitled to live in a district that has an equal resource base for education. Such a norm is difficult to construct and neither the California Supreme Court nor the authors of *Private Wealth and Public Education* in their development of Proposition 1 have even attempted to state or support it. A recent article by professor Ferdinand P. Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1402-12 (1971), does make just such an argument. He states that lower tax base districts require greater taxpayer sacrifice than wealthier districts to raise educational revenue. Since the acceptability to voters of tax proposals "varies inversely with the burden," *id.* 1407, "voters in low tax base districts who seek to increase educational appropriations are forced to assume a proportionally heavier burden of electoral persuasion than those who wish to achieve an identical goal in the more affluent districts." *Id.* This electoral burden, which varies from district to district, bears no reasonable relationship to a legitimate state policy and thus denies equal protection under a Baker v. Carr, 369 U.S. 186 (1962) voting rights rationale. Professor Schoettle concedes that this approach leaves the field of education completely and would apply to all decisions of monetary issues faced by local governing bodies. He also concedes that his constitutional argument does not depend on poverty as a classification, but applies to all relative taxpayer disadvantage. He concludes that his analysis would not compel absolute equalization or elimination of local tax bases but only reduction of the gross wealth disparities to the point where they no longer affect the electoral persuasiveness

On the other hand, it is doubtful that the *Serrano* holding requires this stricter equal protection test to justify an equal wealth system like district power equalizing. *Serrano* employed the compelling interest test because it found a combination of a wealth classification and a fundamental interest.[120] District power equalizing satisfies the former test since the revenue it produces is based, not on district wealth, but on district tax effort. District power equalizing, then, would not have to meet a compelling interest test, and could be upheld on only the rational basis analysis.

This conclusion, however, points up the fundamental theoretical problem in the *Serrano* approach. Viewed from the perspective of the child and his family's interest in equal education, the current system and district power equalizing suffer the same inade-

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of adherents to the same goal among different districts.

While provocative, the Schoettle thesis is ultimately unconvincing. It has all the difficulties of the lack of a manageable judicial standard that *Serrano* and Proposition 1 rightly try to avoid. These same difficulties of measuring subtleties of differential political power are what compelled the United States Supreme Court to reject an argument similar to Professor Schoettle's in Whitcomb v. Chavis, 403 U.S. 124 (1971), concerning at-large elections, even in a racial context. Moreover, his theory would logically invalidate any number of things that affect electoral power unequally including multimember districts, single-party districts, and the seniority and committee systems in legislatures. Finally, all the electoral cases that Professor Schoettle cites involve inequalities among electors in the same political entity, that is, electors competing for statewide decisionmaking influence. Thus in *Baker v. Carr*, the constitutional vice was unequal weighing, by district, of voters in relation to their ability to influence the state legislature. Professor Schoettle's *Serrano* analysis, however, expressly eschews such a rationale as being foreclosed by James v. Valtierra, 402 U.S. 137 (1971). His rationale, rather, is that electors of a poor district have less internal district power than do those of wealthy districts. He thus posits lack of pure horizontal equality of voters in different areas, with no racial or poverty components and regardless of the issues involved, as a basis for invalidating the universal American system of local government financing. This lack of horizontal equality is said to make the system "irrational." Yet a system that provides that local resources should be available to local government to finance its needs is clearly not irrational.

[120] *See* note 22 *supra*.

quacies. Neither is a wealth classification; they are both residence classifications in their actual effects. To the extent that expenditures are related to educational quality, the child receives a poorer education whether he lives in a poor district or simply one that undervalues education.

Since the court's equal wealth standard allows for these continued educational disparities, the essential concern of *Serrano* is not the school child but the taxpayer. The California court has spawned a new, but perhaps logically inevitable corollary to Proposition 1: The *economic burden* of public education may not be a function of wealth other than the wealth of the state as a whole. As such the principle of *Serrano* cannot realistically be limited to education, but applies to all burdens of taxation.

APPENDIX "B"

AMENDED IN ASSEMBLY JUNE 22, 1972

AMENDED IN ASSEMBLY JUNE 16, 1972

AMENDED IN ASSEMBLY MAY 24, 1972

AMENDED IN ASSEMBLY MAY 3, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

ASSEMBLY BILL **No. 1283**

Introduced by the Assembly Committee on Education (Leroy F. Greene (Chairman), Chacon (Vice Chairman), Arnett, Cline, Cory, Dent, Dunlap, Fong, Bill Greene, Keysor, Lewis, Maddy, McAlister, Ryan, and Vasconcellos) and Murphy

(Assigned to Arnett)

March 15, 1972

REFERRED TO COMMITTEE ON EDUCATION

An act to amend Sections 6741, 17300, 17303.5, 17414, 17417, 17503, 17603.5, 17651, 17654.5, 17655.5, 17664, 17665, 18102.8, 18102.9, 18102.10, 18355, 18358, 18401, 20404, and 20806 of, to add Sections 13520.3, 17301, 17301.1, 17301.2, 17301.3, 17653, 17662, 17662.3, 17662.5, 18102, and 20751 to, to add Chapter 6.10 (commencing with Section 6499.230) to Division 6 of, to add Chapter 1.7 (commencing with Section 17270) to, and Article 3 (commencing with Section 17701) to Chapter 3 of, Division 14 of, to repeal Sections 1835, 5661, 6854, 6855, 6913.1, 13704, 14657, 14758, 17301, 17656, 17660, 17662, 17665.5, 18102, 18102.2, 18102.4, 18102.6, 20751, 20800, 20801.5, 20802.8, 20807, 20808, 20808.5, and 20816 of, to repeal Article 2.1 (commencing with Section 17671), Article 2.5 (commencing with Section 17680), Article 3 (commencing

with Section 17701), Article 4 (commencing with Section 17751), Article 5 (commencing with Section 17801), Article 7 (commencing with Section 17901), Article 7.1 (commencing with Section 17920), Article 7.2 (commencing with Section 17940), and Article 8 (commencing with Section 17951) of Chapter 3 of Division 14 of, to amend the heading of Article 2 (commencing with Section 17651) of Chapter 3 of Division 14 of, the Education Code, relating to the financial support of public education, making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 1283, as amended, Arnett (Ed.). School finance.

Provides for revised system of allocation of state support for public elementary and high schools, such system being based upon a specified percentage of the current expense of education, as defined.

Provides for computation of maximum expenditures by such school districts.

Specifies system whereby school districts set local tax rates, but prescribed amount of proceeds thereof revert to School District Wealth Equalization Fund, for redistribution to school districts based upon district's ratio of assessed valuation to a.d.a. to statewide average ratio of assessed valuation to a.d.a.

Deletes existing provisions re computation, allocation, and apportionment of amounts denoted as "basic state aid," "equalization aid," and "supplemental support" for elementary school, high school, and community college levels.

Eliminates use of computational tax rates as a factor in computing state and local shares of foundation program support.

Eliminates unification and class size reduction bonuses in apportionment of state school funds.

Eliminates areawide school support programs for areas included in defeated unification proposals.

Revises method of computing the amount of allowances for physically handicapped, mentally retarded, and educationally handicapped pupils. Revises allowances for special

transportation programs.

Makes numerous related changes.

Vote—Majority; Appropriation—Yes; Fiscal Committee—Yes.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in th act to provide for the financial support of publ education in the following manner:

(a) A funding mechanism which (1) minimizes th wealth disparities that presently exist between scho districts and (2) enables every child in the state receive an equal education opportunity.

(b) An adequate level of financial support for th education of every child through a combination of reasonable level of state assistance and local effort.

(c) An orderly transition from the present system to new system of school finance.

(d) A system whereby at least ~~55~~ *50* percent of th educational support is provided from the General Fun in the State Treasury.

(e) A reasonable level of annual increases from th state to meet the pressures of inflation without th necessity of annual legislative action.

(f) The continuation of local control of education programs and the level of local property tax rates.

(g) A mechanism of expenditure controls to replac the present ineffective method of property ta limitations.

(h) ~~A system for the~~ *The* elimination of most of th presently authorized school district permissive overrid taxes.

(i) A system for minimum reliance on the property ta for the support of public education.

SEC. 2. Section 1835 of the Education Code i repealed.

SEC. 3. Section 5661 of the Education Code i repealed.

SEC. 3.5. Chapter 6.10 (commencing with Sectio

6499.230) is added to Division 6 of the Education Code, to read:

CHAPTER 6.10. EDUCATIONALLY DISADVANTAGED YOUTH PROGRAMS

6499.230. It is the intent of the Legislature to provide quality educational opportunities for all children in the California public schools. The Legislature recognizes that because of differences in family income, differing language barriers, and pupil transiency, differing levels of financial aid are necessary to provide quality education for all students.

6499.231. From the funds appropriated by the Legislature for the purposes of this chapter, the Superintendent of Public Instruction, with the approval of the State Board of Education, shall administer this chapter and make apportionments to school districts to meet the total approved expense of the school districts incurred in establishing education programs for pupils who qualify economically and educationally in preschool, kindergarten, or any of grades 1 through 12, inclusive. Nothing in this chapter shall in any way preclude the use of federal funds for educationally disadvantaged youth.

6499.232. Maximum apportionments allowable to school districts shall be determined by the following factors:

(a) An index of "potential impact of bilingual-bicultural pupils" determined by dividing the percent of pupils in the district with Spanish and Oriental surnames, as determined by the annual ethnic survey conducted by the Department of Education, by the statewide average percentage of such pupils for unified, elementary, or secondary districts, as appropriate.

(b) A ratio of the district's "index of family poverty," defined as the district's Elementary and Secondary Education Act, Title I entitlement, divided by its average daily attendance in grades 1 through 12, or any thereof maintained, divided in turn by the state average index of family poverty for unified, elementary, or secondary

districts, as appropriate.

(c) A ratio of the district's "index of pupil transiency," as computed from the relationship between the district's average daily attendance and its total annual enrollment, divided by the state average index of pupil transiency for unified, elementary, or secondary districts, as appropriate.

The district's total maximum apportionment under this chapter shall be determined by computing the product of (1) one-third the sum of the above three factors, (2) the number of pupils receiving aid for dependent children support, and (3) a constant amount of three hundred dollars ($300), or such amount as the Superintendent of Public Instruction may determine so that the sum of all allocations will not exceed the funds appropriated by the Legislature for the purposes of this chapter.

6499.233. For the fiscal year 1972–1973, the superintendent shall allocate to local districts an amount equal to not less than 40 percent of the total amount computed under Section 6499.232. For the fiscal year 1973–1974, the superintendent shall allocate not less than 40 percent of the total amount so computed and not more than 90 percent of the amount computed. For the 1974–1975 fiscal year and thereafter, the superintendent shall allocate to each district not less than 40 percent nor more than 100 percent of the amount so computed.

6499.234. In approving programs under this chapter, the State Board of Education shall give due consideration to the effectiveness of the program and shall not continue in operation any program that, upon evaluation, has been shown to be of low effectiveness and which has only limited possibility of improved effectiveness.

For the fiscal year 1973–1974 and for each year thereafter, districts which demonstrate a high degree of program effectiveness shall receive amounts up to their entitlement limits. Districts which demonstrate low levels of program effectiveness shall continue to receive their initial apportionments but the Superintendent of Public Instruction may reduce the additional computed apportionments due such districts, if he determines that

such programs have limited possibilities of improved achievement.

6499.235. The Superintendent of Public Instruction shall apportion the funds available for programs in accord with procedures specified in this chapter and policies which may be adopted by the State Board of Education. Funds shall be allocated to each district within its entitlement based upon a plan submitted by the district to the Superintendent of Public Instruction, and approved by the State Board of Education. The plan shall include (1) an explicit statement of what the district seeks to accomplish, (2) a description of the program and activities designed to achieve these purposes, and (3) a planned program of annual evaluation, including a statement of the criteria to be used to measure the effectiveness of the program.

6499.236. The State Board of Education shall adopt regulations setting forth the standards and criteria to be used in the administration, monitoring, evaluation, and dissemination of programs submitted for consideration under this chapter; 1 percent of the total appropriation for the purposes of this chapter shall be retained by the Department of Education for these purposes. Funds appropriated for the purposes of this chapter not allocated as previously specified shall be allocated by the State Board of Education to promote the intent of this chapter to provide education programs to as many eligible pupils as possible and to stimulate the development, implementation, and evaluation of innovative programs.

6499.237. The Superintendent of Public Instruction shall submit annually to the Governor and to each house of the Legislature a report evaluating the programs established pursuant to this chapter, together with his recommendations concerning whether the same should be continued in operation.

6499.238. There is hereby appropriated from the General Fund in the State Treasury to the State School Fund for the fiscal year 1972–1973 an amount equal to twenty-one dollars and fifty cents ($21.50) multiplied by

the total statewide average daily attendance of the preceding fiscal year in kindergarten and grades 1 to 12, inclusive, to be used for the purposes of Chapter 6.10 (commencing with Section 6499.230) of Division 6 of the Education Code. For the fiscal year 1973–1974 the amount per such unit of average daily attendance shall be forty-three dollars ($43); and for the fiscal year 1974–1975 and thereafter, it shall be fifty-three dollars and seventy-five cents ($53.75).

SEC. 4. Section 6741 of the Education Code is amended to read:

6741. A student shall be deemed to be a resident of the high school district in which he lived at the time of his admission to the program and the excess cost for a school year of educating such student shall be paid by the high school district of which he is a resident to the county superintendent who is providing education for the students. The excess cost shall be determined by dividing the total current expense of education as defined in *subdivision (b) of* Section 17503 and also excluding expense of boarding and lodging during such school year by the total number of units of average daily attendance in such school or classes during such school year, less state and federal apportionments on account of such average daily attendance.

Average daily attendance of students shall be computed, for purposes of this article, by dividing the number of days such student attended the schools or classes by the number of days that the schools or classes were taught, except that with respect to a student attending such schools or classes for more than 175 days in a school year, the average daily attendance shall be computed by using the divisor of 175.

For purposes of computing average daily attendance 180 minutes of class attendance shall be deemed to constitute a schoolday, and no more than 15 hours of class time per week shall be considered.

Not later than July 15th of each year, the superintendent of schools of the county providing education for students shall forward his claim for the

excess expense reimbursement to the high school district of residence of each student during the preceding school year, and the governing board of such high school district shall upon receipt thereof pay such claims.

SEC. 5. Section 6854 of the Education Code is repealed.

SEC. 6. Section 6855 of the Education Code is repealed.

SEC. 7. Section 6913.1 of the Education Code is repealed.

SEC. 8. Section 13520.3 is added to the Education Code, to read:

13520.3. When a school district operates on a year-around schedule pursuant to Chapter 7 (commencing with Section 32100) of Division 22, the salaries of employees who are employed for the extended school year may be adjusted in accordance with the ratio of the extension of the school year in months bears to the length of the school year in months prior to the commencement of year-around operation. No classroom teacher may be required to participate in a year-around program without his consent.

SEC. 9. Section 13704 of the Education Code is repealed.

SEC. 10. Section 14657 of the Education Code is repealed.

SEC. 11. Section 14758 of the Education Code is repealed.

SEC. 12. Chapter 1.7 (commencing with Section 17270) is added to Division 14 of the Education Code, to read:

CHAPTER 1.7. ADJUSTMENTS TO USABLE ASSESSED VALUATION

17270. The Legislature hereby declares that its intent in enacting this chapter is to provide a reasonable and equitable method for ascertaining the value of property located within school districts for use in connection with the administration of state laws providing for the

allocation of state funds to such districts for school purposes on the basis of value and provide for more equal educational opportunity for students residing in districts of varying wealth per unit of average daily attendance and to improve the equity among taxpayers residing in or owning property in districts of varying wealth.

The Legislature hereby further declares that in enacting this chapter it has no intention to affect in any way, whether directly or indirectly, any determination of the assessed value of property for tax purposes.

17271. Each school district shall report to the Superintendent of Public Instruction:

(a) The total assessed valuation of the district; and

(b) The amount equal to:

(1) Ten percent of the total assessed valuation in the 1972–1973 fiscal year.

(2) Twenty percent of the total assessed valuation in the 1973–1974 fiscal year.

(3) Thirty percent of the total assessed valuation in the 1974–1975 fiscal year.

(4) Forty percent of the total assessed valuation in the 1975–1976 fiscal year.

(5) Fifty percent of the total assessed valuation in the 1976–1977 fiscal year and following.

17272. The Superintendent of Public Instruction shall compute the total amounts reported to him pursuant to subdivision (b) of Section 17271 for each type of district. He shall make a separate computation for elementary school districts, high school districts, and unified school districts. He shall divide the total for each type of district by the statewide average daily attendance for the preceding fiscal year for each type of district. The amount computed pursuant to this section is the assessed valuation redistribution amount per unit of average daily attendance for each type of district.

17273. The Superintendent of Public Instruction shall compute for each school district the amount derived by multiplying the assessed valuation redistribution amount per unit of average daily attendance by the average daily attendance of the district for the preceding fiscal year.

The amount computed pursuant to this section is the redistribution amount.

17273.5. The "district assessed valuation" for each district is the total assessed valuation minus the amount reported for it pursuant to subdivision (b) of Section 17271 plus the redistribution amount for the type of district computed pursuant to Section 17273.

17274. (a) Each school district shall compute the amount which the revenue derived from the levy and collection of school district taxes would have been if it had been collected and been based upon an adjusted assessed valuation computed pursuant to Section 17273.5

For the purpose of this ~~subdivision~~ *chapter*, the school district tax shall not include any tax levied and collected pursuant to Sections 15517, 15518, 16633, 16635, 16645.9, 19443, 19572, 19619, 19687, 19695, or 22101.

(b) Each district shall compute the total amount of revenue derived from the levy of school district taxes on property lying within the district.

(c) If the amount computed pursuant to subdivision (a) is less than the amount computed pursuant to subdivision (b), the difference shall be transmitted to the School District Wealth Equalization Fund.

(d) If the amount computed pursuant to subdivision (a) is more than the amount computed pursuant to subdivision (b), the Superintendent of Public Instruction shall allow to the district an amount equal to such difference from the School District Wealth Equalization Fund.

SEC. 13. Section 17300 of the Education Code is amended to read:

17300. It is the intent of the Legislature that the administration of the laws governing the financial support of the public school system in this state be conducted within the purview of the following principles and policies:

The system of public school support should be designed to strengthen and encourage local responsibility for control of public education. Local school districts should be so organized that they can facilitate the provision of

full educational opportunities for all who attend the public schools. Local control is best accomplished by the development of strong, vigorous, and properly organized local school administrative units. It is the state's responsibility to create or facilitate the creation of local school districts of sufficient size to properly discharge local responsibilities and to spend the tax dollar effectively.

Effective local control requires that all local administrative units contribute to the support of school budgets in proportion to their respective abilities, and that all have such flexibility in their taxing programs as will readily permit of progress in the improvement of the educational program. Effective local control requires a local taxing power, and a local tax base which is not unduly restricted or overburdened.

The system of public school support should assure that state, local, and other funds are adequate for the support of a realistic educational program. It is unrealistic and unfair to the less wealthy districts to provide for only a part of the financing necessary for an adequate educational program.

The system of public school support should permit and encourage local school districts to provide and support improved district organization and educational programs. The system of public school support should prohibit the introduction of undesirable organization and educational practices, and should discourage any such practices now in effect. Improvement of programs in particular districts is in the interests of the state as a whole as well as of the people in individual districts, since the excellence of the programs in some districts will tend to bring about program improvement in other districts.

The system of public school support should make provision for the apportionment of state funds to local school districts on a strictly objective basis that can be computed as well by the local districts as by the state. The principle of local responsibility requires that the granting of discretionary powers to state officials over the distribution of state aid and the granting to these officials

of the power to impose undue restriction on the use of funds and the conduct of educational programs at the local level be avoided.

The system of public school support should effect a partnership between the state, the county, and the local district, with each participating equitably in accordance with its relative ability. The respective abilities should be combined to provide a financial plan between the state and the local agencies for public school support. Toward this support program, each county and district, through a uniform method should contribute in accordance with its true financial ability.

The system of public school support should provide for essential educational opportunities for all who attend the public schools. Provision should be made for adequate financing of all educational services.

The broader based taxing power of the state should be utilized to raise the level of financial support in the properly organized but financially weak districts of the state, thus contributing greatly to the equalization of educational opportunity for the students residing therein. It should also be used to provide a minimum amount of guaranteed support to all districts, for such state assistance serves to develop among all districts a sense of responsibility to the entire system of public education in the state. State assistance to all districts also would create a tax leeway for the exercise of local initiative.

The Legislature further declares that in order to reduce the burden of inequitable property taxation it is in the best interest of the state to provide, from other than ad valorem property taxes, a predominate portion of the statewide cost of education in the elementary and secondary schools of the state. The Legislature further declares that the funds to be provided are required in order to reduce the disproportionate demand upon property taxpayers for support of educational services and programs, equalize wide variations in the ability of local communities to support such services and programs, and to assist school districts in meeting increased

demands due to concentrations of educationally disadvantaged pupils.

In recognition of these disparities it is the intent of the Legislature to apportion funds for school purposes in such a manner as to provide adequate educational programs for all students regardless of where they reside or the wealth of their parents and neighbors.

In implementing its intent the Legislature declares that, although the present system of funding does not meet desirable criteria, sudden changes of great magnitude in the system of public school finance would disrupt the educational system of many districts and thereby damage the whole public school system of the state, the educational welfare of all students, and the economy of the state; therefore, rapid change is undesirable and unacceptable.

Accordingly, the Legislature declares its intent to improve with all reasonable and deliberate speed, financial support of education in districts which have less than the statewide average assessed valuation per unit of average daily attendance as rapidly as those districts can efficiently utilize additional support, and at the same time allow districts with more than the statewide assessed valuation per unit of average daily attendance sufficient time to readjust their programs to new methods of financing to avoid precipitous disruption of present programs.

It is further the intent of the Legislature to study the possibility of adopting an apportionment system based upon weighted units of average daily attendance.

SEC. 14. Section 17301 of the Education Code is repealed.

SEC. 15. Section 17301 is added to the Education Code, to read:

17301. The State Controller shall during each fiscal year transfer from the General Fund of the state to the State School Fund such sums as are necessary for the state to provide a specified percentage of the current expense of education, as defined by subdivision ~~(b)~~ *(c)* of Section 17503, for each pupil in average daily attendance during

the preceding fiscal year credited to all kindergarten, elementary and high schools in the state and to the county school tuition funds, as certified by the Superintendent of Public Instruction. For the 1972–1973 and 1973–1974 fiscal years the percentage shall be 45 percent, and for the 1974–1975 fiscal year, and each fiscal year thereafter, the percentage shall be 50 percent. ~~The~~ *In the 1972–1973 fiscal year and each fiscal year thereafter, the* amounts so transferred shall be increased by an amount which shall reflect the application of an adjustment index developed cooperatively by the Superintendent of Public Instruction, the Legislative Analyst, and the Director of Finance. This adjustment index shall reflect the expected change in the cost of a basic educational program, plus any additional costs mandated by the Legislature, for the fiscal year under consideration. The Controller shall adjust such transfers to reflect increases or decreases as estimated by the Superintendent of Public Instruction for the current year in the statewide units of average daily attendance in the kindergartens, elementary, and high schools of the state.

The Controller shall also transfer two hundred ninety-eight dollars and thirty-eight cents ($298.38) from the General Fund to the State School Fund per pupil in average daily attendance credited to the community colleges of the state during the preceding fiscal year.

SEC. 16. Section 17301.1 is added to the Education Code, to read:

17301.1. The State Controller shall also transfer an amount equal to the percentage specified in Section 17301 for any new or expanded program ~~authorized or~~ required by law which was not ~~authorized or~~ required in the preceding fiscal year.

SEC. 17. Section 17301.2 is added to the Education Code, to read:

17301.2. The State Controller shall also transfer an amount from the General Fund to the School Disrict Wealth Equalization Fund equal to any deficit created in that fund.

SEC. 17.5. Section 17301.3 is added to the Education

Code, to read:

17301.3. The State Controller shall also transfer an amount from the General Fund to the State School Fund equal to thirty-eight dollars ($38) multiplied by the average daily attendance credited to all kindergarten, elementary, high school, community college, and adult schools and to county school tuition funds during the preceding fiscal year *for expenditure pursuant to Section 17303.5*.

SEC. 18. Section 17303.5 of the Education Code is amended to read:

17303.5. The amount transferred pursuant to Sections 17301 and 17301.3 shall be expended, in part, in accordance with the following schedule:

(a) Twenty-one dollars and fifty cents ($21.50) multiplied by the total average daily attendance credited during the preceding school year to elementary school districts which during the preceding school year had less than 901 units of average daily attendance, to high school districts which during the preceding school year had less than 301 units of average daily attendance, and to unified districts which during the preceding school year had less than 1,501 units of average daily attendance, but not to exceed an amount equal to seventy cents ($0.70) multiplied by the average daily attendance credited during the preceding fiscal year to all kindergarten, elementary, high school, community college and adult schools in the state and to county school tuition funds, for allowance to county school service funds pursuant to subdivision (a) of Section 18352.

(b) Four dollars and forty cents ($4.40) multiplied by the total average daily attendance credited to all kindergarten, elementary, high school, community college and adult schools in the state and to county school tuition funds during the preceding school year for the purposes of Article 10 (commencing with Section 18051) of Chapter 3 of this division.

(c) Nineteen dollars and fifty-two cents ($19.52) multiplied by the total average daily attendance credited to all kindergarten, elementary, high school, community

college and adult schools in the state and to county school tuition funds during the preceding school year, for the purposes of Sections 18060 and 18062, and Article 11 (commencing with Section 18101) of Chapter 3 of this division.

(d) Three dollars and six cents ($3.06) multiplied by the total average daily attendance credited to all kindergarten, elementary, high school, community college and adult schools in the state and to county school tuition funds during the preceding school year for allowances to county school service funds pursuant to subdivision (b) of Section 18352.

(e) One dollar and sixty-seven cents ($1.67) multiplied by the average daily attendance during the preceding fiscal year credited to all kindergarten, elementary, high school, community college and adult schools in the state and to county school tuition funds for allowances to school districts for the purposes of Section 6426.

(f) Eight dollars and sixty-five cents ($8.65) multiplied by the average daily attendance during the preceding school year credited to all kindergarten, elementary, high school, community college and adult schools in the state and to county school tuition funds for purposes of Chapter 7.1 (commencing with Section 6750) of Division 6.

SEC. 19. Section 17414 of the Education Code is amended to read:

17414. If during any fiscal year there is apportioned to a school district or to any fund from the State School Fund at least one hundred dollars ($100) more or at least one hundred dollars ($100) less than the amount to which the district or fund was entitled, the Superintendent of Public Instruction, in accordance with regulations that he is herewith authorized to adopt not later than the third succeeding fiscal year shall withhold from, or add to, the apportionment made during such fiscal year, the amount of such excess or deficiency, as the case may be. Notwithstanding, any other provision of this code to the contrary, excesses withheld or deficiencies added by the

Superintendent of Public Instruction under this section shall be added to or allowed from any portion of the State School Fund.

SEC. 20. Section 17417 of the Education Code is amended to read:

17417. Wherever the attendance of pupils is not included in the computation of the average daily attendance of a school district for any fiscal year because the certification document of the person employed by the district to instruct such pupils was not in force during the period of such attendance, the governing board of the district may, upon payment of the salary of such person pursuant to Section 13515, or similar provisions of law, report such attendance to the Superintendent of Public Instruction during the fiscal year in which such salary is paid. Such report shall be made in such form as shall be prescribed and furnished by the Superintendent of Public Instruction. Thereafter the Superintendent of Public Instruction shall add to the apportionment from the State School Fund to the district during the next succeeding fiscal year or years, as determined by him but not exceeding three, the additional amount to which the district would have been entitled in the fiscal year next succeeding that in which such attendance was not included in the computation of the average daily attendance of the district if such amount is at least one hundred dollars ($100) or more.

Any such additional amount shall be apportioned from the State School Fund before any other apportionment from such fund is made and shall be allowed from any portion of such fund.

SEC. 21. Section 17503 of the Education Code is amended to read:

17503. For purposes of this section:

(a) "Salaries of classroom teachers" and "teacher" shall have the same meanings as prescribed by Section 17200 of this code provided, however, that the cost of all health and welfare benefits provided to the teachers by the school district shall be included within the meaning of salaries of classroom teachers.

(b) "Current expense of education" means the gross total expended (not reduced by estimated income or estimated federal and state apportionments) for the purposes classified in the final budget of a school district (except one which, during the preceding fiscal year, had less than 101 units of average daily attendance) submitted to and approved by the county superintendent of schools pursuant to Section 20607 of this code for administration, instruction (including salaries and other expense), health services, operation of plant, maintenance of plant, and fixed charges. "Current expense of education" shall not include those purposes classified as transportation of pupils, food service, community service, capital outlay, state school building loan repayment; and shall not include the amount expended pursuant to any lease agreement for plant and equipment or the amount expended from funds received from the federal government pursuant to the "Economic Opportunity Act of 1964" or any extension of such act of Congress.

(c) For the purposes of Sections 17301, 17654.5, 17655.5, 17662, 17664, 17665, and Article 3 (commencing with Section 17701) of this chapter, the current expense of education shall include only state funds apportioned as basic aid, equalizaton aid, supplemental support and additional equalization aid; local funds derived pursuant to subdivision (a) of Section 17274; miscellaneous funds, as defined in Section 17606; and any federal funds allocated as general aid, such as funds allocated pursuant to Public Law 81-874.

For 1973–1974 and each fiscal year thereafter, state basic aid, equalization aid, supplemental support, and additional equalization aid shall mean state funds allocated pursuant to Sections 17654.5, 17655.5, 17662, 17664, and 17665.

The statewide average current expense of education per unit of average daily attendance shall mean the sum of the funds specified by this subdivision received by all districts in the state of the particular type (elementary, high school, or unified) divided by the ~~foundation~~

~~program~~ average daily attendance reported by those same districts.

There shall be expended during each fiscal year for payment of salaries of classroom teachers:

(a) By an elementary school district, sixty percent (60%) of the district's current expense of education.

(b) By a high school district, fifty percent (50%) of the district's current expense of education.

(c) By a community college district, fifty percent (50%) of the district's current expense of education.

(d) By a unified school district, fifty-five percent (55%) of the district's current expense of education.

If the Superintendent of Public Instruction determines that a school district has not expended the applicable percentage of current expense of education for the payment of salaries of classroom teachers during the preceding fiscal year, he shall, in apportionments made to the school district from the State School Fund after April 15 of the current fiscal year, designate an amount of such apportionment or apportionments equal to the apparent deficiency in district expenditures. Any amount so designated by the Superintendent of Public Instruction shall be deposited in the county treasury to the credit of the school district, but shall be unavailable for expenditure by the district pending the determination to be made by the Superintendent of Public Instruction on any application for exemption which may be submitted to the Superintendent of Public Instruction. In the event it appears to the governing board of a school district that the application of the preceding paragraphs of this section during a fiscal year results in serious hardship to the district, or in the payment of salaries of classroom teachers in excess of the salaries of classroom teachers paid by other districts of comparable type and functioning under comparable conditions, the board may, with the written approval of the county superintendent of schools having jurisdiction over the district apply to the Superintendent of Public Instruction in writing not later than September 15th of the succeeding fiscal year for exemption from the

requirements of the preceding paragraphs of this section for the fiscal year on account of which the application is made. Upon receipt of such application, duly approved, the Superintendent of Public Instruction shall grant the district exemption for any amount that is less than one thousand dollars ($1,000), and if the amount is one thousand dollars ($1,000), or greater may grant the district exemption, to the extent deemed necessary by him, from such requirements for the fiscal year on account of which the application is made. If such exemption is granted the designated moneys shall be immediately available for expenditure by the school district governing board. If no application for exemption is made or exemption is denied, the Superintendent of Public Instruction shall order the designated amount or amount not exempted to be added to the amounts to be expended for salaries of classroom teachers during the next fiscal year.

The Superintendent of Public Instruction shall enforce the requirements prescribed by this section, and may adopt necessary rules and regulations to that end. He may require the submission to him, during the school year, by school district governing boards and county superintendents of schools, of such reports and information as may be necessary to carry out the provisions of this section.

Any reference in this code to "current expense of education as defined in Section 17503" enacted prior to the enactment of Chapter 1.7 (commencing with Section 17270) of this division shall mean current expense of education as defined in subdivision (b) of Section 17503.

SEC. 22. Section 17603.5 of the Education Code is amended to read:

17603.5. The amounts computed as allowable to any ~~school~~ *community college* district for state aid shall be reduced by fifty percent (50%) of miscellaneous funds, as defined in Section 17606. In no event shall the reduction exceed the total amount allowable as state aid to the school district ~~for the fiscal year. For such purposes, miscellaneous funds, as defined in Section 17606, received~~

~~by a unified school district, shall be allocated to the kindergarten and elementary, high school and community college grades, respectively, on the basis of the proportion of the district's total average daily attendance in each such grade level, and the provisions of Section 17601 shall be applicable.~~ *for the fiscal year.*

Should the amount of miscellaneous funds, as defined in Section 17606, actually received by a ~~school~~ *community college* district for any fiscal year be more or less than that reported to the Superintendent of Public Instruction, the Superintendent of Public Instruction shall during the fiscal year next succeeding withhold from or add to the apportionment made to the district from the State School Fund the amount of the excess or deficiency in the apportionment of state aid from the State School Fund for the preceding year, if the amount of the excess or deficiency in such apportionment was one hundred dollars ($100) or more.

SEC. 23. The heading of Article 2 (commencing with Section 17651) of Chapter 3 of Division 14 of the Education Code is amended to read:

Article 2. Computation of Foundation Programs and School Support for School Districts

SEC. 24. Section 17651 of the Education Code is amended to read:

17651. The Superintendent of Public Instruction shall compute for each school district the amount of school support therefor, in the manner prescribed by this article.

SEC. 25. Section 17653 is added to the Education Code, to read:

17653. No aid in excess of one hundred twenty dollars ($120) per unit of average daily attendance shall be allowed unless there shall have been levied pursuant to this code, for a district during the fiscal year, a tax, exclusive of taxes levied under Sections 1822.2, 1825, 16633, 16635, 16645.9, 19443, 19619, 20801, and 22101, of not less than one dollar ($1) if an elementary district, eighty

cents ($0.80) if a high school district, *one dollar and eighty cents ($1.80) if a unified school district,* and twenty-five cents ($0.25) if a community college district.

SEC. 26. Section 17654.5 of the Education Code is amended to read:

17654.5. For each elementary school district which maintains only one school with an average daily attendance of less than 101, he shall make one of the following computations, whichever provides the lesser amount:

(1) For each small school which has an average daily attendance during the fiscal year of less than 26, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school at least one teacher was hired full time, he shall compute for the the product of 25 multiplied by the appropriate percentage specified in Section 17301 multiplied by the relative support factor specified in Section 17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503.

(2) For each small school which has an average daily attendance during the fiscal year of 26 or more and less than 51, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school at least two teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 50 multiplied by the appropriate percentage specified in Section 17301 multiplied by the relative support factor specified in Section 17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503.

(3) For each small school which has an average daily attendance during the fiscal year of 51 or more but less than 76, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school three teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 75 multiplied by

the relative support percentage specified in Section 17301 multiplied by the appropriate factor specified in Section 17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503.

(4) For each small school which has an average daily attendance during the fiscal year of 76 or more and less than 101, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school four teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 100 multiplied by the appropriate percentage specified in Section 17301 multiplied by the ~~appropriate~~ *relative support* factor specified in Section ~~17662~~ *17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503*.

SEC. 27. Section 17655.5 of the Education Code is amended to read:

17655.5. (a) For each district on account of each necessary small school (giving regard to the number of teachers actually employed or average daily attendance), he shall make one of the following computations, whichever provides the lesser amount:

(1) For each necessary small school which has an average daily attendance during the fiscal year of less than 26, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school at least one teacher was hired full time, he shall compute for the district the product of 25 multiplied by the appropriate percentage specified in Section 17301 multiplied by the ~~appropriate~~ *relative support* factor specified in Section ~~17662~~ *17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503*.

(2) For each necessary small school which has an average daily attendance during the fiscal year of 26 or more and less than 51, exclusive of pupils attending the

seventh and eighth grades of a junior high school, and for which school at least two teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 50 multiplied by the appropriate percentage specified in Section 17301 multiplied by the ~~appropriate~~ *relative support* factor specified in Section ~~17662~~ *17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503*.

(3) For each necessary small school which has an average daily attendance during the fiscal year of 51 or more but less than 76, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school three teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 75 multiplied by the appropriate percentage specified in Section 17301 multiplied by the ~~appropriate~~ *relative support* factor specified in Section ~~17662~~ *17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503*.

(4) For each necessary small school which has an average daily attendance during the fiscal year of 76 or more and less than 101, exclusive of pupils attending the seventh and eighth grades of a junior high school, and for which school four teachers were hired full time for more than one-half of the days schools were maintained, he shall compute for the district the product of 100 multiplied by the appropriate percentage specified in Section 17301 multiplied by the ~~appropriate~~ *relative support* factor specified in Section ~~17662~~ *17662.5 multiplied by the statewide average current expense of education for elementary districts as determined pursuant to subdivision (c) of Section 17503*.

(b) For each elementary district which exclusive of pupils attending the seventh and eighth grades of a junior high school has an average daily attendance of 101 or more during the fiscal year, he shall compute the

allowance in accordance with subdivision (b) of Section 17662, plus any amount pursuant to Sections 17654.5 and 17655.5.

SEC. 28. Section 17656 of the Education Code is repealed.

SEC. 29. Section 17660 of the Education Code is repealed.

SEC. 30. Section 17662 of the Education Code is repealed.

SEC. 31. Section 17662 is added to the Education Code, to read:

17662. (a) The Superintendent of Public Instruction shall allow to each school district on account of the average daily attendance credited to the district in the appropriate grade levels an amount computed in accordance with subdivision (b) of this section plus any amount pursuant to the provisions of Sections 17654.5, 17655.5, and 17664.

No apportionment may be less than one hundred twenty dollars ($120) per unit of average daily attendance.

(b) The apportionment to a school district ~~equals~~ *shall be* the product of *(1)* the number of units of average daily attendance of the district ~~and~~, *(2)* the appropriate percentage specified in Section 17301 ~~and~~, *(3)* the statewide average current expense of education for the type of district (elementary, high school, or unified) as defined in subdivision (c) of Section 17503 and *(4)* the relative support factor of the district, as determined pursuant to Section 17662.5.

SEC. 32. Section 17662.3 is added to the Education Code, to read:

17662.3. The relative wealth index of a school district is the quotient of the assessed valuation per unit of average daily attendance of the district, as adjusted pursuant to Chapter 1.7 of Division 14 (commencing with Section 17270), divided by the statewide assessed valuation per unit of average daily attendance for the particular type of school district.

SEC. 33. Section 17662.5 is added to the Education

Code, to read:

17662.5. The relative support factor of a school district is computed in the following manner:

(a) For districts with a relative wealth index of 0.5 or less, the relative support factor is 0.991 plus one-half multiplied by the quantity 1.5 minus twice the relative wealth index.

(b) For districts with a relative wealth index greater than 0.5 but equal to or less than 1.5, the relative support factor is 0.991 plus one-half multiplied by the quantity one minus the relative wealth index.

(c) For districts with a relative wealth index greater than 1.5, the relative support factor is the reciprocal of 0.9 divided by the relative wealth index.

SEC. 34. Section 17664 of the Education Code is amended to read:

17664. For each district on account of each necessary small high school the Superintendent of Public Instruction shall make one of the following computations selected with regard only to the number of certificated employees employed or average daily attendance, whichever provides the lesser amount:

Average daily attendance	Minimum number of certificated employees	Amount to be allowed
1- 20	3	$8,500
21- 40	4	16,980
41- 60	5	25,470
61- 75	6	31,830
76- 90	7	38,190
91-105	8	44,560
106-120	9	50,920
121-135	10	52,280
136-150	11	63,650
151-180	12	76,370
181-220	13	93,340
221-260	14	110,310
261-300	15	127,300

For each district which has an average daily attendance of less than 21 and for which fewer than three certificated employees were employed, he shall _____ ($_____) allow four thousand dollars ($4,000) for each of the teachers employed in the school.

For the purposes of this section a "certificated employee" is an equivalent full-time position of an individual holding a credential authorizing service, and performing service in grades 9 through 12 in any secondary school. Any fraction of an equivalent full-time position shall be deemed to be a full-time position.

The allowance established by this section for high schools with an average daily attendance of less than 301 shall not apply to any high school established after July 1, 1961 unless the establishment of such schools has been approved by the Superintendent of Public Instruction.

SEC. 35. Section 17665 of the Education Code is amended to read:

17665. For each high school district which has an average daily attendance of 301 or more during the fiscal year, he shall compute the allowance in accordance with subdivision (b) of Section 17662 plus any amount pursuant to Section 17664.

SEC. 36. Section 17665.5 of the Education Code is repealed.

SEC. 37. Article 2.1 (commencing with Section 17671) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 38. Article 2.5 (commencing with Section 17680) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 39. Article 3 (commencing with Section 17701) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 40. Article 3 (commencing with Section 17701) is added to Chapter 3 of Division 14 of the Education Code, to read:

Article 3. Adjustments to Expenditures

17701. ~~In~~ *Adjustments to expenditures pursuant to this article shall commence in the 1972–1973 fiscal year as adjustments to the 1971–1972 current expense of education as defined in subdivision (c) of Section 17503. In the 1973–1974 fiscal year, and each fiscal year thereafter, similar adjustments to expenditures shall be made annually.*

In computing the transfer to the State School Fund pursuant to Section 17301 and the apportionments to districts pursuant to Section 17662, the Superintendent of Public Instruction shall annually adjust the amounts by a factor which is a function of the adjustment in the adjustment index developed pursuant to Section 17301 as prescribed by this article.

For the purposes of this article, reference to expenditures per unit of average daily attendance shall have the same meaning as "current expense of education" as used in subdivision ~~(b)~~ *(c)* of Section 17503.

17702. For the purposes of this article the following definitions shall apply:

(a) "Relative expenditure index" is the quotient of the district's expenditure per unit of average daily attendance divided by the statewide average current expense of education per unit of average daily attendance for the particular type of district (elementary, high school, or unified).

(b) "Relative salary index" is the quotient of the district's average salary for certificated or classified employees by the statewide average salary for certificated or classified employees.

Separate computations are to be made for each category of employees.

(c) The "reasonable expenditure increment factor" for a district which has a relative expenditure index greater than one is the quotient of the change in the adjustment index developed pursuant to Section 17301 divided by the square of the relative expenditure index.

The "reasonable expenditure increment factor" for a

district which has a relative expenditure index equal to or less than one is the product of the adjustment index developed pursuant to Section 17301 multiplied by the quantity three minus twice the relative expenditure index.

17703. Annual salary increases for the employees of a district which has relative salary index greater than one may not exceed the amount determined by the application of a factor which is the quotient of a salary index developed by the Superintendent of Public Instruction, the Legislative Analyst, and the Department of Finance divided by the square of the relative salary index.

17704. Annual salary increases for the employees of a district which has a relative salary index equal to or less than one may not exceed the amount determined by the application of a factor which is the product of the index developed by the Superintendent of Public Instruction, the Legislative Analyst, and the Department of Finance multiplied by the quantity three minus twice the relative salary index.

17705. With respect to increases in salaries of certificated employees the Superintendent of Public Instruction shall disregard any increases granted on account of additional academic training or promotion to a different job category.

17706. The expenditures per unit of average daily attendance in any school district may not increase by a factor greater than the reasonable expenditure increment factor unless such expenditures have been approved by the electorate pursuant to Section 20803. In the event a district exceeds such expenditure guidelines the Superintendent of Public Instruction shall disregard such excess expenditures when computing the average current expense of education pursuant to subdivision (c) of Section 17503.

17707. In the event a district exceeds the increases authorized by Sections 17703, 17704, and 17705 regarding salary increases the Superintendent of Public Instruction shall withhold from apportionments any amount in

excess of such computations. When computing the statewide average current expense of education *pursuant to subdivision (c) of Section 17503* he shall also omit any amounts attributable to excessive increases in salaries.

17708. Apportionments from the State School Fund shall be adjusted to reflect the application of the reasonable expenditure index to the apportionment for each school district.

SEC. 41. Article 4 (commencing with Section 17751) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 42. Article 5 (commencing with Section 17801) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 43. Article 7 (commencing with Section 17901) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 44. Article 7.1 (commencing with Section 17920 of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 44.5. Article 7.2 (commencing with Section 17940) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 45. Article 8 (commencing with Section 17951) of Chapter 3 of Division 14 of the Education Code is repealed.

SEC. 46. Section 18102 of the Education Code is repealed.

SEC. 47. Section 18102 is added to the Education Code, to read:

18102. The Superintendent of Public Instruction shall allow to each school district and county superintendent of schools for each particular category of minors in a special education program during the current fiscal year an amount computed as follows:

(a) He shall divide the average daily attendance in each particular category of minors in a special education program by the maximum class size established by law for special day classes for each particular category of minor in a special education program, and increasing the

quotient to the next highest integer where a fractional amount is produced.

(b) He shall then determine for each particular category the product of the amount computed under subdivision (a) multiplied by the maximum class size established by law for special day classes for the particular category.

(c) He shall then multiply the amount computed under subdivision (b) by the following amount for the particular grade level and category:

Category	Elementary school grades (K–8)	High school grades (9–12)
Physically handicapped		
Class-size maximum of 3	$5,400	—
Class-size maximum of 5	—	$2,965
Class-size maximum of 6	2,520	—
Class-size maximum of 8	1,800	1,670
Class-size maximum of 10	1,370	1,240
Class-size maximum of 12	1,080	950
Class-size maximum of 16	—	590
Class-size maximum of 20	—	375
Mentally retarded (as defined in Section 6902)		
Class-size maximum of 15	570	440
Class-size maximum of 18	420	285
Mentally retarded (as defined in Section 6903)	920	785
Educationally handicapped	1,000	870

SEC. 48. Section 18102.2 of the Education Code is repealed.

SEC. 49. Section 18102.4 of the Education Code is repealed.

SEC. 50. Section 18102.6 of the Education Code is repealed.

SEC. 51. Section 18102.8 of the Education Code is amended to read:

18102.8. The governing board of a school district with an average daily attendance of less than 2,000 pupils

during the current fiscal year, or a county superintendent of schools, may apply to the Superintendent of Public Instruction whenever sparsity of population or transportation distances make it impossible to maintain classes of the maximum size as prescribed by this code or by the State Board of Education. If the Superintendent of Public Instruction, upon review, finds that it is impossible to maintain classes of the maximum size as prescribed by this code or by the State Board of Education, he may add to the amounts allowed under Section 18102 an amount sufficient to provide for the needed classes, but not more per special class than the applicable amounts computed in that section.

SEC. 52. Section 18102.9 of the Education Code is amended to read:

18102.9. (1) In addition to the allowances provided under Section 18102, the Superintendent of Public Instruction shall allow to school districts and county superintendents of schools for each unit of average daily attendance for an amount as follows:

(a) For instruction of educationally handicapped minors in learning disability groups, ~~two thousand four hundred eighty dollars ($2,480)~~ *one thousand eight hundred eighty dollars ($1,880)*.

(b) For instruction of educationally handicapped minors in homes or in hospitals, one thousand three hundred dollars ($1,300).

(c) For instruction of physically handicapped minors in remedial physical education, ~~nine hundred fifty dollars ($950)~~ *seven hundred seventy-five dollars ($775)*.

(d) For remedial instruction of physically handicapped minors in other than physical education, ~~two thousand seven hundred forty dollars ($2,740)~~. *two thousand dollars ($2,000)*.

(e) For instruction of blind pupils when a reader has actually been provided to assist the pupil with his studies, or for individual instruction in mobility provided blind pupils under regulations prescribed by the State Board of Education, or when braille books are purchased, ink print materials are transcribed into braille, or sound recordings

and other special supplies and equipment are purchased for blind pupils, or for individual supplemental instruction in vocational arts, business arts, or homemaking for blind pupils, nine hundred ten dollars ($910).

Braille books purchased, braille materials transcribed from ink print, sound recordings purchased or made, and special supplies and equipment purchased for blind pupils for which state or federal funds were allowed are property of the state and shall be available for use by blind pupils throughout the state as the State Board of Education shall provide.

(f) For other individual instruction of physically handicapped minors, one thousand three hundred dollars ($1,300).

(g) For the instruction of physically handicapped minors in regular day classes, ~~one thousand one hundred dollars ($1,100)~~ *one thousand eighteen dollars ($1,018)*.

(2) (a) The allowances provided under Section 18102 may be increased proportionately on account of special day classes convened, or other instruction provided a pupil, for days in a school year which are in excess of the number of days in the school year on which the regular day schools of a district are convened.

(b) The Superintendent of Public Instruction shall compute for each applicant school district and county superintendent of schools in providing in such year a program of specialized consultation to teachers, counselors and supervisors for educationally handicapped minors, an amount equal to the product of ten dollars ($10) and the average daily attendance of pupils enrolled in special day classes, learning disability groups, and home and hospital instruction for educationally handicapped minors.

SEC. 53. Section 18102.10 of the Education Code is amended to read:

18102.10. For each special class or program for which a state allowance is provided under this article or under Section 18060 or 18062, each school district and each county superintendent of schools maintaining such

special classes or programs shall report annually to the Superintendent of Public Instruction, on forms he shall provide, all expenditures and income related to each special class or program.

If the Superintendent of Public Instruction determines that the current expense of operating a special class or program as defined in the California School Accounting Manual does not equal or exceed the sum of the basic program support determined pursuant to Section 17662 and the allowance provided under this article for each pupil in average daily attendance in the special class or program maintained by a school district for each pupil in average daily attendance in special classes or programs maintained by the county superintendent of schools, then the amount of such deficiency shall be withheld from state apportionments to the school district or the county superintendent of schools, as the case may be, in the succeeding fiscal year in accordance with the procedure prescribed in Section 17414.

Expenditures for equipment that the Superintendent of Public Instruction determines are necessary for instruction in a special class or program for physically handicapped minors shall be considered as current expense for purposes of this section. In any year the district's allowable expenditure for such equipment may not exceed 1 percent of the current expense of operating the district's physically handicapped program.

SEC. 54. Section 18355 of the Education Code is amended to read:

18355. The Superintendent of Public Instruction shall allow, in addition to all other allowances, to the county school service funds: (a) for all emergency schools maintained in each elementary school district of the county by the county superintendent of schools, (b) all special schools or classes for mentally retarded minors and severely mentally retarded minors maintained in each elementary school district of the county by the county superintendent of schools, (c) each elementary school maintained in juvenile halls, juvenile homes, and juvenile camps, by the county superintendent of schools,

and all opportunity schools and classes maintained by the county superintendent of schools pursuant to Sections 6502 and 6503, and (d) all schools and classes for educationally handicapped minors maintained in each elementary school district of the county by the county superintendent of schools, the same amount per elementary pupil as he would allow under Section 17662.

No allowance shall be made for emergency schools which is in excess of the actual expense of maintaining the emergency school.

SEC. 55. Section 18358 of the Education Code is amended to read:

18358. For all physically handicapped pupils, mentally retarded minors and educationally handicapped minors of secondary grade, and handicapped adults, educated by the county superintendent of schools and for all secondary schools maintained in juvenile halls, juvenile homes and juvenile camps by the county superintendent of schools, the Superintendent of Public Instruction shall allow the same amount per high school pupil as he would allow under Section 17662.

However, with respect to handicapped adults, the following limits shall apply:

(a) The total of allowances for education of handicapped adults in classes established by the county superintendent of schools pursuant to Section 5746 shall not exceed fifty thousand dollars ($50,000) in any one fiscal year. The Superintendent of Public Instruction shall establish a system of priorities that he shall by rule or regulation adopt which shall give highest priority to those counties in which no or an insufficient program for the education of handicapped adults is provided by the school districts within the county, in order to comply with the limitation prescribed by this subdivision.

(b) The Superintendent of Public Instruction shall allow for handicapped adults the amount specified in Section 17951 for each unit of average daily attendance for adults for high school districts.

SEC. 56. Section 18401 of the Education Code is

amended to read:

18401. The Superintendent of Public Instruction shall allow to each county school tuition fund one hundred twenty dollars ($120) for each unit of average daily attendance of pupils residing in the county and attending school in an adjoining state during the fiscal year. Such average daily attendance shall not be included in the computations provided for in Section 17702.

SEC. 57. Section 20404 of the Education Code is amended to read:

20404. On or before August 15, the county board of education shall file with the board of supervisors a certified statement showing the amount of money to be raised by a county tax for purposes of this chapter. The board of supervisors shall fix a rate for the county tax sufficient to produce the amount specified in the statement and shall, at the time of levying other county taxes, levy the tax so fixed.

The proceeds of the tax levied pursuant to this section shall be credited to the single county school service fund of the county and any expenses of the county superintendent of schools, the county board of education, and the county committee on school district organization required by Section 881 or any other sections of this code required to be paid from the county general fund shall not be paid from such fund but shall be paid from the money in the single county school service fund.

A tax levied pursuant to this section shall not exceed the rate of ten cents ($0.10) per one hundred dollars ($100) of assessed valuation for administrative and business functions.

SEC. 58. Section 20751 of the Education Code is repealed.

SEC. 59. Section 20751 is added to the Education Code, to read:

20751. (a) It is the intent of the Legislature that ~~statutory maximum tax rates be sufficient to permit an average wealth school district to provide an average expenditure program when local revenues are combined with state allowances and apportionments.~~

~~(b) The maximum tax rate per each one hundred dollars ($100) of assessed valuation for an elementary, high school, and unified school district is as set forth in the following table:~~

~~Fiscal Year~~	~~Elementary~~	~~High School~~	~~Unified~~
~~1972/1973.....~~	~~$2.00~~	~~$1.20~~	~~$3.20~~
~~1973/1974.....~~	~~1.75~~	~~1.10~~	~~2.85~~
~~1974/1975 and following.....~~	~~1.50~~	~~1.00~~	~~2.50~~

~~(c) The maximum tax rate for a community college district is thirty/five cents ($0.35) for community college purposes, and ten cents ($0.10) for adult education purposes, on each one hundred dollars ($100) of assessed valuation.~~

~~(d) The maximum tax rates set forth in this section may be exceeded with the approval of a majority of the electorate pursuant to Section 20803.~~

~~(e) If the authorized expenditure level for the 1972/73 fiscal year exceeds seven hundred twenty/five dollars ($725) for elementary districts or exceeds nine hundred twelve dollars ($912) for high school districts, such expenditures may not be increased except by election of the voters of the district.~~

~~(f) If, during 1973/74, and in subsequent fiscal years, the authorized expenditure level exceeds the statewide average current expense of education per unit of average daily attendance for the elementary districts and 112 percent of the statewide average current expense for high school districts, such expenditures may not be increased except by election of the voters of the district.~~ *expenditure controls applied pursuant to Article 3 (commencing with Section 17701) of Chapter 3 of Division 14 replace statutory school district tax rate limitations for elementary, high school, and unified districts.*

No district may exceed the authorized expenditure level determined pursuant to Article 3 (commencing

with Section 17701) of Chapter 3 of Division 14 unless such excess expenditures have been approved by the electorate pursuant to Section 20803.

For community college districts the maximum tax rate shall be thirty-five cents ($0.35) for community college purposes, and ten cents ($0.10) for adult education purposes, on each one hundred dollars ($100) of assessed valuation.

SEC. 60. Section 20800 of the Education Code is repealed.

SEC. 61. Section 20801.5 of the Education Code is repealed.

SEC. 62. Section 20802.8 of the Education Code is repealed.

SEC. 63. Section 20806 of the Education Code is amended to read:

20806. For the purpose of providing funds for the payment by the district of all or part of the premiums, dues, or other charges for health and welfare benefits on active officers and employees and retired officers and employees who at the time of retirement were enrolled in a health and welfare benefit plan, or on the spouses and dependent children of such active and retired officers and employees, or on both such active and retired officers and employees and their spouses and dependent children, which the governing board of a district may have authorized in accordance with the provisions of Article 1 (commencing with Section 53200) of Chapter 2 of Part 1 of Division 2 of Title 5 of the Government Code and for the expenses incurred by the district in administration of a program involving the payment of such health and welfare benefits, district taxes, up to a maximum of five cents ($0.05) per one hundred dollars ($100) of assessed valuation, may be levied and collected annually by the respective district at the same time and in the same manner as other district taxes are levied and collected. The tax shall be in addition to any other district tax now or hereafter authorized by law, and shall not be considered in fixing maximum rates of tax for school district purposes. Moneys collected pursuant to this

section may also be expended for the requirements of Section 13658.

The provisions of this section authorizing the payment of all or part of the premiums, dues, or other charges for health and welfare benefits for the retired officers and employees who at the time of retirement were enrolled in a health and welfare benefit plan, shall be limited in applicability to any school district, or of two or more school districts governed by governing boards of identical personnel, having an average daily attendance of 400,000 or more as shown by the annual report of the county superintendent of schools for the preceding year.

SEC. 64. Section 20807 of the Education Code is repealed.

SEC. 65. Section 20808 of the Education Code is repealed.

SEC. 66. Section 20808.5 of the Education Code is repealed.

SEC. 67. Section 20816 of the Education Code is repealed.

~~SEC. 68. Sections 2, 3, 4, 5, 6, 7, 9, 10, 11, 60, 61, 62, 64, 65, 66, and 67 of this act shall become operative on July 1, 1974. From July 1, 1972, until July 1, 1974, the taxes for special purposes actually levied in all school districts which will be eliminated pursuant to those sections of this act shall be reduced by an amount which will limit the revenues of each district to not more than will provide the prior year's expenditure level plus the application of the reasonable expenditure increment factor pursuant to Article 3 (commencing with Section 17701) of Chapter 3 of Division 14 of the Education Code. All such rates shall be reduced proportionately unless the county superintendent of schools approves an alternate method of reduction.~~

O



APPENDIX "C"

AMENDED IN SENATE JUNE 20, 1972

AMENDED IN SENATE MAY 23, 1972

SENATE BILL No. 1302

Introduced by Senators Dymally, Alquist, Grunsky, ~~and~~ ~~Rodda~~ *Rodda, Behr, and Moscone*

(Coauthors: Assemblymen Arnett, Cory, Dunlap, Bill Greene, ~~and~~ ~~Lewis~~ *Lewis, Fong, and MacDonald*)

March 15, 1972

An act to ~~*add Chapter 6.1 (commencing with Section 6445) to Division 6*~~ AMEND SECTION 16601.5 *of, to add Sections 16602.5 and 16602.6 to,* ~~*and to amend Section 16601.5*~~ TO ADD CHAPTER 6.1 (COMMENCING WITH SECTION 6445) TO DIVISION 6 OF, AND TO ADD ARTICLE 1.5 (COMMENCING WITH SECTION 16820) TO CHAPTER 1 OF DIVISION 13 *of, the Education Code,* AND *to amend the heading of Chapter 2.5 (commencing with Section 16150) of Part 4 of Division 9 of, to amend Section 16150 of, and to add Sections 16151.5 and 16153.5 to, the Welfare and Institutions Code, relating to early childhood education, and making and appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1302, as amended, Dymally. ~~Education~~ *Early childhood education.*

~~States legislative intent re establishment of statewide program for early childhood education.~~

~~Defines "educational program for early childhood education" as the entire school/sponsored offering for pupils, other than exceptional children, in early primary classes, kindergarten, and grades 1 through 3, including in/class and out/of/class activities.~~

Requires State Board of Education to establish comprehensive program for early childhood education at

specified levels.

Authorizes governing boards of school districts maintaining specified grade levels to develop master plans for early childhood level in the 1972–73 fiscal year.

~~Permits, beginning with 1972/1973 school year, and requires beginning with 1976/1977 school year, each school district maintaining kindergarten and specified elementary grades, to submit to department of education for approval, a master plan for early childhood education.~~

Requires such school districts to develop and submit master plans by 1976–77 school year.

Authorizes governing boards to develop and submit joint master plans to Department of Education.

~~Specifies criteria to be contained in master plan.~~

Requires master plans to incude comprehensive statement setting forth district's educational program.

~~Specifies factors to be considered by State Board of Education in establishing preferences and priorities among school districts for purpose of apportioning state funds appropriated for implementation of early childhood education programs.~~

Requires State Board of Education to establish standards and criteria in evaluating district plans which shall include specified standards and criteria and specifies that the State Board of Education shall approve a plan which provides for initiation of classes for pupils who have attained the age of 3 years and 9 months unless such provisions contain a restructuring of kindergarten and grades one through three.

Authorizes State Board of Education to condition future allowances *on a priority basis and apportioning allowances thereby,* and *authorizes* scheduled increases thereof on school district's meeting objectives contained in master plan.

~~Authorizes State Board of Education to establish performance objectives in reading and mathematics for pupils participating in early childhood education programs.~~

Requires State Board of Education to adopt reading and mathematics objectives by 1975–76 school year, and allows the board to take all actions necessary to reach objectives.

~~Establishes schedule of allowances to school districts for purposes of early childhood educational programs, including~~

~~additional allowances for pupils with special educational needs.~~

Provides for allowances to districts with approved master plans in three specified classes.

Provides for additional allowances to pupils having demonstrable educational needs in three specified classes.

Authorizes Superintendent of Public Instruction to reduce district apportionments in accordance with amounts received pursuant to allowances for specialist teachers.

Requires Superintendent of Public Instruction to apportion funds.

Prescribes child enrollment procedure for early primary class, minimum school day, and computation of average daily attendance.

Specifies age for admission to an early childhood education program as 3 years and 9 months.

Specifies minimum schoolday for pupils in early childhood education classes as 180 minutes, including recesses.

~~Appropriates funds for fiscal years 1973/1974 through 1977/1978, for purposes of early childhood education programs. Requires that of funds so appropriated, so much thereof as is needed shall be used to match federal funds to support pupils eligible under the Social Security Act for public social services. Authorizes Department of Education to allocate funds appropriated for specified compensatory preschool programs, to augment preschool, children's center, group child care, and early childhood educational programs.~~

Declares legislative purpose in having program of transportation of pupils attending early primary classes and permits the governing board of any school district to transport pupils or parents attending such classes maintained for pupils who have attained the age of 3 years and 9 months.

Appropriates funds, in varying amounts, to the Superintendent of Public Instruction for providing state reimbursements for such transportation for each of the fiscal years from 1973–74 through 1977–78, inclusive.

Includes group child care and early childhood education programs within scope of various existing provisions relating to preschool, children's center, and day care programs, and excludes day care programs from such provisions.

Requires Department of Social Welfare to contract with Department of Education to provide system of prescribed social services for children and families of children enrolled in an early childhood education program. Prohibits making of any per capita reimbursements under such social services on account of any school district not meeting prescribed standards for educational component of a program.

Makes appropriations of specified amounts from the General Fund to the Department of Education for purposes of specified early childhood education programs for 1973–1974, 1974–1975, 1975–1976, 1976–1977, and 1977–1978 fiscal years.

Makes provision re use of certain other funds for purposes of early childhood education programs contingent upon enactment of ~~unspecified Assembly Bill~~ *AB 1283*.

Vote—Majority; Appropriation—Yes; Fiscal Committee—Yes.

The people of the State of California do enact as follows:

SECTION 1. Chapter 6.1 (commencing with Section 6445) is added to Division 6 of the Education Code, to read:

CHAPTER 6.1. EARLY CHILDHOOD EDUCATION

~~6445. The Legislature hereby finds and declares that~~ *6445. For the purposes of this chapter, "early childhood education programs" are defined as all educational programs, except those for exceptional children as defined in Section 6870, offered in the public school system, including in-class and out-of-class activities, for children age 3 years and 9 months, to 8 years under a local school-by-school comprehensive master plan approved by the State Board of Education which is designed to assure:*

(a) A comprehensive restructuring of primary education in California kindergarten through third grade to more fully meet the unique needs, talents, interests and abilities of each child.

(b) That early educational opportunities are made available to children who are 3 years and 9 months of age to take advantage of the capacity for learning of children at this age level.

(c) The cooperation and participation of parents in the educational program to the end that the total community is involved in the development of the program.

(d) The pupils participating will develop an increased competency in the skills necessary to the successful achievement in later school subjects such as reading, language, and mathematics.

(e) Maximize the use of existing state and federal funds in the implementation of early childhood education programs.

6445.1. The Legislature hereby finds and declares that a comprehensive program of early childhood education is needed to restructure public education in California. The Legislature, therefore, declares its intent to require that the State Board of Education develop a comprehensive program for children ages 3 years and 9 months, to 8 years. The objectives of this plan will include assurance that each child will have an individualized program to permit the development of his maximum potential and that all pupils who have completed the third grade of the state's educational system will have achieved a level of competence in the basic skills of reading, language, and mathematics sufficient to continued success in their educational experiences. The system will be based on the development of a local school-by-school master plan for early childhood education which shall include a phase-in program based on an increase in the number of schools in the state participating each year until maximum participation is achieved.

~~a comprehensive and coordinated program of early childhood education developed by the State Board of Education is needed to improve and restructure public education in California. The Legislature declares its intent to require that the State Board of Education~~

~~establish a comprehensive program for early childhood education for children in early primary, kindergarten, and grades 1 through 3, through a system for the development of a local master plan for early childhood education. Such system shall include a phased-in program based on an increase in the number of schools in the state participating each year until maximum participation is achieved, the coordination of all available state and federal funding sources, maximizing available federal funds, and the elements specified in Section 6445.1.~~

~~6445.1. As used in this chapter:~~

~~(a) "Early childhood education" includes all educational programs, except programs or classes for exceptional children as defined in Section 6870, offered in early primary classes, kindergartens, and grades 1 to 3, inclusive, or in any one or more such classes or grades.~~

~~(b) "Educational program for early childhood education" means the entire school-sponsored offering for pupils, except for exceptional children defined in Section 6870, in early primary classes, kindergartens, and grades 1 to 3, inclusive, including in-class and out-of-class activities.~~

~~(c) "Early primary grade" or "early primary class" means a class established pursuant to Education Code Section 6446.~~

~~(d) "Department" means the Department of Education.~~

6445.2. Beginning with the 1972–1973 ~~school year,~~ *fiscal year* each school district maintaining kindergarten, and grades 1 to 3, inclusive, or any one or more such class or grade, may develop and submit to the ~~department~~ *Department of Education* for approval a master plan for early childhood education. Each such school district shall submit *to the Department of Education for approval* a master plan for early childhood education ~~to the department~~ no later than the 1976–1977 school year. Application shall be made in accordance with rules and regulations adopted by the State Board of Education.

6445.3. The governing boards of ~~two or more~~ *any* school districts maintaining any such class or grade may,

with the approval of the ~~department~~ *Department of Education*, develop and submit for approval a joint master plan for early childhood education.

6445.4. A master plan for early childhood education shall include a comprehensive statement setting forth the district's educational program for early childhood education. The State Board of Education shall establish standards and criteria to be used in the evaluation of plans submitted by school districts. Such standards *and criteria for review and approval of plans by the State Board of Education* shall include, but need not be limited to ~~; criteria to insure that approved plans make~~ provision for:

(a) ~~An assessment~~ *Assessment* of educational needs ~~of the district~~.

(b) A program of restructuring of kindergarten through third grade.

~~(b)~~ *(c)* Opportunities for ~~early primary education provided by the district~~ *educational programs for pupils three years and nine months of age including children's center, day care, preschool, and child care services*.

~~(c)~~ *(d)* Defined and measurable program objectives.

~~(d) A carefully articulated program from early primary through grade 3.~~

(e) A local program designed to systematically phase into the program all the schools of the district in no more than five years.

~~(e)~~ *(f)* Coordination of all district resources with the objectives of the local plan.

~~(f)~~ *(g)* Emphasis on an individualized diagnostic approach to instruction.

~~(g) Strong parental~~ *(h) Parental and community* involvement.

~~(h)~~ *(i)* Staff development and inservice training.

~~(i)~~ *(j)* Transportation of pupils participating in the program.

~~(j)~~ *(k)* Evaluation of the program.

~~6445.5. In approving master plans for early childhood education the department shall give preference to those districts which have the largest number of pupils~~

~~determined to have special educational needs and the least financial ability to provide funds for early childhood education. The State Board of Education shall adopt regulations setting forth criteria for determining special educational needs, taking into consideration such factors, among others, as low family income and low level of academic achievement.~~

~~6445.6. The State Board of Education shall adopt standards setting forth priorities for allowances under this chapter. Until such time as allowances are granted for the benefit of all pupils eligible in a district a minimum of 50 percent of the amount allowed to the district in any one year shall be allocated for the benefit of pupils with special educational needs as determined pursuant to criteria established in accordance with Section 6445.5. Such standards may provide that allowances to a district shall be provided on a phase-in basis rather than to all pupils eligible therefor under Sections 6445.8 and 6445.9.~~

The State Board of Education shall not approve a plan which provides for the initiation of classes for pupils who have attained the age of 3 years and 9 months unless it also contains provisions for restructuring kindergarten and grades 1 through 3.

6445.5. School districts with master plans for early childhood education approved pursuant to Section 6445.4 shall be eligible for allowances authorized under Sections 6445.12, 6445.13, and 16821. Such allowances shall be apportioned to the extent that funds are available on a priority basis in accordance with a schedule established by the State Board of Education.

6445.6. In apportioning allowances in accordance with Section 6445.5 for early childhood education, the Department of Education shall give highest priority to (1) those districts which have the largest number of pupils determined to have educational need, and (2) those districts with the lowest measure of assessed valuation per pupil and making the most significant property tax effort.

The State Board of Education shall adopt regulations setting forth criteria for the determination of educational

need which shall be based on such factors as a low level of pupil achievement and a low level of family income.

6445.7. Districts receiving allowances pursuant to this chapter shall provide that a minimum of 50 percent of the amount allowed to the district in any one year shall be designated for schools with the largest number of pupils with educational need identified pursuant to Section 6445.6 until such time as allowances are authorized for all schools.

6445.8. The State Board of Education may further provide that ~~if~~, upon its determination ; *that* a district has not met the objectives of its approved plan, allowances shall not be increased in accordance with the phase-in schedule of the district's approved plan. The board ~~may provide that the failure of a district, over a designated period, to meet the objectives of its approved plan shall subject the district to a termination of allowances under this chapter.~~ *shall provide for an annual review of the success of each local district in meeting the objectives of its approved plan for early childhood education. The board shall adopt rules and regulations governing the termination of allowances to districts which are unsuccessful in meeting the objectives of their approved plan.*

~~6445.7~~ *6445.9*. The State Board of Education shall adopt pupil performance objectives in reading and mathematics for use in district early childhood education programs not later than the 1975–1976 school year. The board ~~may~~ *is authorized to* take all actions necessary to effect the development, testing, validation, adoption and implementation of such objectives.

6445.10. (a) Each district with an approved master plan shall submit to the Department of Education a report of its early childhood education program. Such report shall be submitted in a form and manner and at such times, but not less than annually, as prescribed by the State Board of Education. The report shall include, but not be limited to, factors relating to:

(1) Fiscal expenditures.

(2) Degree and success of program implementation.

(3) Quantitative estimate of pupil progress.

(b) The Department of Education shall derive a composite score for each school which shall be obtained from each of the three factors listed in paragraphs (1), (2), and (3) of subdivision (a). In determining such score, the Department of Education shall, for the first year of participation by the school, assign a weight of 20 percent for factor (1), 70 percent for factor (2), 10 percent for factor (3). For the second year of participation by the school, the factors shall be assigned a weight of 10 percent for factor (1), 50 percent for factor (2), 40 percent for factor (3). For the third and each subsequent year of participation, only factors (2) and (3) shall be considered and shall receive equal weighting.

6445.11. The Department of Education shall compute an index of student attainment for each participating school, using factors which have been shown to be predictive of school success. The obtained score for each school shall be weighted by the degree this score meets or exceeds the predicted school achievement level. Obtained scores falling below the predicted level of attainment shall be treated as a zero score. The Department of Education shall inform each participating district of the relative performance of their participating schools. Such data shall regularly be analyzed and evaluated and submitted to the Legislature in the form of an annual report not later than the fifth legislative day of each regular session of the Legislature.

~~6115.8~~ *6445.12*. From the funds appropriated *therefor* by the Legislature to the ~~department~~ *Department of Education* for the purposes of this chapter, the Superintendent of Public Instruction shall allow ~~to each school district with an approved master plan,~~ *school districts with approved master plans* for the education of children pursuant to such ~~plan an amount equal to~~ *plans*:

(a) Five hundred dollars ($500) per pupil in average daily attendance in the district in each ~~early primary class~~ *class maintained for pupils who have attained the age of 3 years and 9 months*.

(b) One hundred thirty dollars ($130) per pupil in

average daily attendance ~~in the district~~ in each kindergarten class.

(c) One hundred thirty dollars ($130) per pupil in average daily attendance ~~in the district~~ in grades 1 to 3, inclusive.

~~6115.9~~ *6445.13*. In addition to the allowances provided for in Section ~~6115.8~~ *6445.12*, the Superintendent of Public Instruction ~~shall allow to each school district having an approved master plan, on account of pupils having demonstrated special educational needs, as determined in accordance with Section 6115.5, an amount equal to:~~ *shall provide grants for pupils determined by him to have demonstrated educational need, in accordance with Section 6445.6, as follows:*

(a) One hundred dollars ($100) per pupil in average daily attendance ~~in the district in each early primary class~~ *in each class for pupils who have attained the age of 3 years and 9 months*.

(b) Sixty-five dollars ($65) per pupil in average daily attendance ~~in the district~~ in each kindergarten class.

(c) Sixty-five dollars ($65) per pupil in average daily attendance ~~in the district~~ in grades 1 to 3, inclusive.

~~6115.10. Funds available for allowances by the Superintendent of Public Instruction pursuant to Article 5 (commencing with Section 5789) of Chapter 5.8 of Division 6 of the Education Code to each school district which is also eligible for allowances under this chapter are hereby reappropriated for allowances to such districts under this chapter.~~

6445.14. In computing allowances authorized pursuant to Section 6445.12 the Superintendent of Public Instruction shall reduce such allowances by the amount per pupil apportioned pursuant to Article 5 (commencing with Section 5789) of Division 6.

~~6115.11~~ *6445.15*. Allowances under this chapter shall be made by the Superintendent of Public Instruction from funds appropriated therefor by the Legislature. The allowances shall be made as early as practicable in the fiscal year and upon order of the Superintendent of

Public Instruction the State Controller shall draw his warrants upon the money appropriated, in favor of the eligible districts in the amounts ordered.

6445.16. The Department of Education shall continuously monitor and review to assure that all funds appropriated to school districts under this chapter are expended for the purposes intended.

6445.17. Allowances shall not be granted under this chapter to a district unless the fiscal effort of the district with respect to early childhood education for any fiscal year of participation under this chapter was not less than the fiscal effort for that purpose for the fiscal year preceding the district's participation under this chapter.

6445.18. Allowances shall not be granted to a district unless the fiscal effort of that district with respect to each child participating in the early childhood education program for any fiscal year of participation under this chapter is no less than the fiscal effort of the district per elementary child not participating in the early childhood education program. The Department of Education shall annually review individual district expenditures to assure the comparability of local support based on rules and regulations adopted by the State Board of Education which take into account growth in district enrollment and increases in district costs.

~~6445.19~~ *6445.19*. The State Board of Education shall have the power to adopt and promulgate all rules and regulations necessary to the effective administration of this chapter, including, but not necessarily limited to, those specifically required to be adopted by particular provisions of this chapter.

~~6445.20~~ *6445.20*. The governing board of the school district, in its application for approval of a master plan, may request waiver of the provisions of any section or sections of this code if such waiver is necessary to establish and operate an early childhood education program. The need for waiver shall be explained and justified in the application. The Superintendent of Public Instruction, with approval of the State Board of Education, may grant, in whole, or in part, any such

request *when, in the opinion of the Superintendent of Public Instruction, failure to grant such request would hinder the implementation and maintenance of the district's program.*

6445.21. A school district in its application for approval of a master plan for early childhood education may include children's center services as provded for in Section 16603.

6446. The governing board of any school district which has had a master plan for early childhood education approved by the ~~department~~ *Department of Education* shall establish and maintain ~~sufficient number of early primary classes~~ *such number of classes for pupils who have attained the age of 3 years and 9 months,* as are necessary to implement such approved master plan for children ~~residing in the district who~~ *living in the district that* are eligible for admission pursuant to Section 6446.1 but are not eligible for admission pursuant to Section 5254 and whose parents or guardians present them for admission.

6446.1. A child may be admitted to ~~an early primary~~ *a* class established pursuant to Section 6446 ~~only~~ *in any term* during the first school month of the term ~~and only if he is then~~ *if he is* of the age prescribed. For good cause the governing board of a school district may permit a child of the proper age to be admitted to the class after the first school month of the school term.

If there is but one term during the school year, the child shall be three years and nine months of age on or before September 1 of the current school year. If there are two terms maintained during the school year, the child shall be three years and nine months on or before September 1 of the current school year, ~~to~~ *before he may* be admitted in the first term of the school year, or three years and nine months of age on or before February 1 of the current school year, ~~to~~ *before he may* be admitted in the second term in any school year.

As part of a master plan approved under Section 6445.4 school districts may authorize admission of any child who is four years of age regardless of time of admission in the

school year.

6446.2. The State Board of Education shall establish minimum standards authorizing service of instructional personnel in ~~early primary classes~~ *classes established pursuant to Section 6446*.

6446.3. The minimum schoolday for ~~pupils in early primary classes~~ *classes established pursuant to Section 6446* is 180 minutes inclusive of recesses.

6446.4. The computation of average daily attendance in ~~early primary classes~~ *classes established pursuant to Section 6446* for the purpose of determining allowances under Sections ~~6445.8 and 6445.9~~ *6445.12 and 6445.13*, shall be as prescribed in Section 11301. Sections 10951 to 10955, inclusive, and Sections 11001, 11002, 11007 and 11301.6 shall apply ~~to early primary classes~~.

6446.5. So much of the ~~money allocated for allowances pursuant to Section 6445.9~~ *moneys appropriated for allowances pursuant to Section 6445.12*, as is needed, shall be for the purpose of providing state funds to ~~match~~ *be matched with* available federal funds to support those pupils eligible under the Social Security Act for public social services. Federal reimbursement shall be obtained by the Department of Social Welfare for services to children of those families, designated by the State Department of Education, eligible for federal financial participation under the Social Security Act. The State Department of Social Welfare and the State Department of Education shall enter into a contract wherein the Department of Education agrees to provide educational services for such pupils wherein the Department of Social Welfare agrees to pay to the Department of Education all costs of services to participants.

~~6446.6. Nothing in this chapter shall be construed to sanction, perpetuate, or promote the racial or ethnic segregation of pupils in the public schools.~~

SEC. 2. Section 16601.5 of the Education Code is amended to read:

16601.5. The facilities used for any children's center established pursuant to this chapter shall first be used for

children of families meeting the conditions of Section 16603.1 and may then be made available for children eligible for any children's center, preschool or group child care program, authorized by the laws of this state, and any early childhood education program conducted under Chapter 6.1 (commencing with Section 6445) of Division 6.

The Department of Education shall develop guidelines and procedures for allocating funds appropriated for compensatory preschool educational programs as defined in Section 16151 of the Welfare and Institutions Code to augment preschool, children's center, and group child care programs, and early childhood education programs conducted under Chapter 6.1 (commencing with Section 6445) of Division 6. Any moneys appropriated for such purpose in any fiscal year which are not expended may be carried over into the next succeeding fiscal year, and shall be available for expenditure in such fiscal year in addition to those funds appropriated for such purpose for such year.

SEC. 3. Section 16602.5 is added to the Education Code, to read:

16602.5. A school district in its application for approval of a master plan for early childhood education pursuant to Chapter 6.1 (commencing with Section 6445) of Division 6 shall include children's centers' services as provided for in this chapter.

SEC. 4. Section 16602.6 is added to the Education Code, to read:

16602.6. The term "elementary school" contained in Section 425 of the United States Code (the National Defense Education Act of 1958, P.L. 85-864 as amended) shall include early primary, and preschool classes, including preschool classes in children's centers, for the purpose of the cancellation provisions of the Loans to Students in Institutions of Higher Learning.

SEC. 5. Article 1.5 (commencing with Section 16820) is added to Chapter 1 of Division 13 of the Education Code, to read:

Article 1.5. Transportation for Early Primary Pupils

16820. The Legislature hereby declares that a comprehensive program of early childhood education is necessary to improve and restructure public education in California so as to provide each pupil with an opportunity for the early development of primary skills. The program shall include classes maintained for pupils, who have attained the age of 3 years and 9 months, as an integral part of early childhood education.

The Legislature further finds that the transportation of pupils in such classes to and from school is an essential aspect of such program and a necessary part of any educational program designed for such children.

16821. Notwithstanding any other provision of law, the governing board of any school district may provide for the transportation to and from school of pupils who have attained the age of 3 years and 9 months and are enrolled in classes established pursuant to Section 6446, whenever in the judgment of the board, such transportation is advisable and good reasons exist therefor. A governing board may allow for the transportation of parents of pupils enrolled in such classes for the purpose of accompanying their children to and from the attendance center offering such early primary classes.

Children meeting the eligible age requirement for enrollment in such class who are attending a children's center, child day care center, or preschool program operated by a public or private agency are deemed to be enrolled in such class for the purpose of this section.

Districts shall receive state reimbursements for the transportation of such pupils pursuant to Article 10 (commencing with Section 18051) of Chapter 3 of Division 14 of the Education Code.

SEC. 6. There is hereby appropriated from the General Fund to the Superintendent of Public Instruction for the purpose of providing state reimbursement for the transportation of pupils pursuant

to Section 16821, amounts for transfer to augment subdivision (b) of Section 17303.5 of the Education Code and which shall be made available for expenditure as follows:

(a) For the fiscal year 1973–74, eight hundred sixty-nine thousand eight hundred fifty dollars ($869,850).

(b) For the fiscal year 1974–75, two million twenty-nine thousand six hundred fifty dollars ($2,029,850).

(c) For the fiscal year 1975–76, three million one hundred eighty-nine thousand four hundred fifty dollars ($3,189,450).

(d) For the fiscal year 1976–77, four million three hundred forty-nine thousand two hundred fifty dollars ($4,349,250).

(e) For the fiscal year 1977–78, five million seven hundred ninety-nine thousand dollars ($5,799,000).

Any moneys made available for expenditure under this section in any such fiscal year which are not expended may be carried over into the next succeeding fiscal year, and shall be available for expenditure in such fiscal year in addition to those funds otherwise made available by this section for such year.

~~SEC. 5~~ *SEC. 7.* The heading of Chapter 2.5 (commencing with Section 16150) of Part 4 of Division 9 of the Welfare and Institutions Code is amended to read:

CHAPTER 2.5. PRESCHOOL, CHILDREN'S CENTER, GROUP CHILD CARE, AND EARLY CHILDHOOD EDUCATION PROGRAMS

~~SEC. 6~~ *SEC. 8.* Section 16150 of the Welfare and Institutions Code is amended to read:

16150. The Legislature finds and declares that preschool programs with a strong educational component are of great value to all children in preparing them for success in school, and constitute an essential component of public social services as defined in Section 16151. The Legislature further finds that such programs

are often not available to many children who, because of the low income of their families, parents in training, or minimal employment, are deprived of adequate care and this valuable educational experience. Therefore, it is the intention of the Legislature in enacting this chapter to provide equal educational opportunity to children of low-income or disadvantaged families through appropriate arrangements for preschool, children's center, group child care, and early childhood education programs of an educational value to be developed in accordance with a contractual agreement between the State Department of ~~Health~~ *Social Welfare* and the State Department of Education. The Legislature believes that the introduction of young children to an atmosphere of learning will improve their performance and increase their motivation and productivity when they enter school. In order to achieve this end, all programs established under this chapter shall be centered upon a defined educational program developed, conducted, and administered with the maximum feasible participation of the families served by the program.

~~SEC. 7~~ *SEC. 9.* Section 16151.5 is added to the Welfare and Institutions Code, to read:

16151.5. The State Department of Social Welfare shall enter into a contract with the State Department of Education to provide for a statewide system of social services for children educated under an early childhood education master plan pursuant to Chapter 6.1 (commencing with Section 6445) of Division 6 of the Education Code, to be established by school districts for children and families who meet the requirement for services under Education Code Section 6446.5. Social services shall include those provided for in Section 10053 and in Part 3 (commencing with Section 11000) of Division 9 of this code and the federal Social Security Act Amendments of 1967.

~~SEC. 8~~ *Sec. 10.* Section 16153.5 is added to the Welfare and Institutions Code, to read:

16153.5. Notwithstanding any other provision of this code, the State Department of Social Welfare shall not

provide any per capita reimbursement pursuant to Section 16151.5 on account of any local school district program established pursuant to this chapter which does not meet the educational standards established by the State Board of Education.

All programs established pursuant to this chapter shall meet the requirements of Section 107 of Public Law 90-222 (Economic Opportunity Amendments of 1967).

The State Department of Social Welfare shall have only such functions, duties and responsibilities with respect to early childhood education programs conducted pursuant to Chapter 6.1 (commencing with Section 6445) of Division 6 of the Education Code as is required by law and federal regulations.

~~SEC. 9~~ *Sec. 11.* There is hereby appropriated from the General Fund to the ~~Superintendent of Public Instruction~~ *Department of Education* for the purposes of Chapter 6.1 (commencing with Section 6445) of Division 6 of the Education Code, the following amounts:

(a) For allowances under Section ~~6445.8~~ *6445.12* amounts which shall be made available for expenditure as follows:

(1) For the fiscal year 1973–1974, forty-four million five hundred forty-four thousand dollars ($44,544,000).

(2) For the fiscal year 1974–1975, one hundred three million nine hundred thirty-six thousand dollars ($103,936,000).

(3) For the fiscal year 1975–1976, one hundred sixty-three million three hundred twenty-eight thousand dollars ($163,328,000).

(4) For the fiscal year 1976–1977, two hundred twenty-two million seven hundred twenty thousand dollars ($222,720,000).

(5) For the fiscal year 1977–1978, two hundred ninety-six million nine hundred sixty thousand dollars ($296,960,000).

(b) For the purposes of subdivision (a) of Section ~~6445.9~~ *6445.13*, amounts which shall be made available for expenditure as follows:

(1) For the 1973–1974 fiscal year, one million eight

hundred twenty-seven thousand seven hundred fifty dollars ($1,827,750.

(2) For the 1974–1975 fiscal year, four million two hundred sixty-four thousand seven hundred fifty dollars ($4,264,750).

(3) For the 1975–1976 fiscal year, six million seven hundred one thousand seven hundred fifty dollars ($6,701,750).

(4) For the 1976–1977 fiscal year, nine million one hundred thirty-eight thousand seven hundred fifty dollars ($9,138,750).

(5) For the 1977–1978 fiscal year, twelve million one hundred eighty-five thousand dollars ($12,185,000).

(c) For the purposes of subdivisions (b) and (c) of Section ~~6445.9~~ *6445.13*, amounts which shall be made available for expenditure as follows:

(1) For the 1973–1974 fiscal year, six million five hundred sixty-six thousand five hundred thirty-seven dollars ($6,566,537).

(2) For the 1974–1975 fiscal year, fifteen million three hundred twenty-one thousand nine hundred twenty dollars ($15,321,920).

(3) For the 1975–1976 fiscal year, twenty-four million seventy-seven thousand three hundred three dollars ($24,077,303).

(4) For the 1976–1977 fiscal year, thirty-two million eight hundred thirty-two thousand six hundred eighty-six dollars ($32,832,686).

(5) For the 1977–1978 fiscal year, forty-three million seven hundred seventy-six thousand nine hundred fifteen dollars ($43,776,915).

(d) The sum of five hundred thousand dollars ($500,000) for the administration by the State Department of Education of the provisions of Chapter 6.1 (commencing with Section 6445) of Division 6 of the Education Code.

Any moneys made available for expenditure under this section in any such fiscal year which are not expended may be carried over into the next succeeding fiscal year, and shall be available for expenditure in such fiscal year

in addition to those funds otherwise made available by this section for such year.

~~SEC. 10~~ *SEC. 12.* A master plan for early childhood education shall provide that to the extent feasible, funds allocated to the district pursuant to Chapter 6.10 (commencing with Section 6499.230) of Division 6 of the Education Code, as added by Assembly Bill No. *1 1 1283*, shall be for purposes of Chapter 6.1 (commencing with Section 6445) of Division 6 of the Education Code. This section shall become operative only if Chapter 6.10 (commencing with Section 6499.230) is added to Division 6 of the Education Code by Assembly Bill No. *1 1 1283* of the 1972 Regular Session.

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Supreme Court, U. S.
FILED
JUL 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR REPUBLIC NATIONAL BANK OF DALLAS, FIRST CITY NATIONAL BANK OF HOUSTON, MERCANTILE NATIONAL BANK AT DALLAS, BANK OF TEXAS, AND SECURITIES INDUSTRY ASSOCIATION, INC. AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR REPUBLIC NATIONAL BANK OF DALLAS, FIRST CITY NATIONAL BANK OF HOUSTON, MERCANTILE NATIONAL BANK AT DALLAS, BANK OF TEXAS, AND SECURITIES INDUSTRY ASSOCIATION, INC. AS *AMICI CURIAE*

Amici curiae, four Texas banks which hold more than $100 million in principal amount of Texas school district bonds and the Securities Industry Association, Inc. (hereinafter "SIA"), many of whose members are underwriters of Texas school district bonds, submit this brief to urge this Court, if it should affirm the decision of the District Court, to make clear that its decision should only be applied prospectively from the ultimate determination of the action, and should not affect the enforceability of Texas school district bonds outstanding at the time of the District

Court's decision (hereinafter "outstanding bonds") and bonds authorized and issued prior to the ultimate disposition of this action (hereinafter "interim-issued bonds"). Counsel for all parties have given written consent to the filing of this brief pursuant to Rule 42(2).*

Question Presented

The *amici* banks and the SIA do not wish to, and do not, take any position with respect to the District Court's basic holding that the present Texas system of financing public education denies equal protection. This brief is addressed solely to the following question:

> Should any restructuring of the system of financing public education in the State of Texas pursuant to this Court's decision on the present appeal protect the continuing collectibility of property taxes levied to pay the principal and interest on outstanding and interim-issued Texas school district bonds?

The District Court in its Clarification of Original Opinion dated January 26, 1972 held that this question should be answered in the affirmative, and we support this holding.

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* The *amici* banks and the SIA were denied leave to intervene of right in the District Court, and appealed directly to this Court from this denial in order to establish their right to participate as parties and to present two issues not then fully presented by the existing parties, (1) the need to assure the continuing enforceability of outstanding and interim-issued bonds, and (2) the need to allow the states broad flexibility in framing any new system of financing public education. *Republic Nat'l Bank* v. *Rodriguez*, Oct. Term, 1971, No. 71-1339. This Court dismissed the appeal for want of jurisdiction, but granted leave to file the jurisdictional statement as a brief *amici curiae* in connection with the jurisdictional statement on the present appeal pursuant to Rule 42(1). 40 U.S.L.W. 3575 (June 7, 1972). This brief is limited to the first issue presented in the earlier appeal, because we believe that the need for flexibility has now been adequately presented by the earlier jurisdictional statement and by other *amici*.

Interest of *Amici Curiae*

About $3 billion in principal amount of Texas school district bonds were sold during the 25 years 1946-1971 (R. 199, 2*), of which over $2 billion are still outstanding (R. 184, 3-4). About $250 million in principal amount of Texas school district bonds were sold in 1971 alone (R. 200, Ex. F). Members of the SIA, a voluntary national organization of more than 700 securities firms and banks, served as underwriters for the great majority of these bonds (R. 199, 1-2) and intend to continue to underwrite Texas school district bonds (R. 204, Masterson Aff., 2). Many SIA members also hold outstanding Texas school district bonds as investments (*ibid.*), and the four *amici* banks hold over $100 million in principal amount of Texas school district bonds (almost five per cent of the total outstanding) for their own account and as trustees for various charitable, testamentary, and other trusts.**

Any impairment of the continuing collectibility of the property taxes levied to pay the Texas school district bonds held by the *amici* banks and other SIA members would adversely affect their value and their status as legal investments for fiduciaries, and would jeopardize the marketability of future issues of Texas school district bonds.*** Thus the interest of the *amici* banks and the SIA in the continuing enforceability of outstanding and interim-issued Texas school district bonds is immediate and substantial.

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* Citations in the form "R. 199, 2" refer to page 2 of document 199 of the record on appeal.

** R. 204, Roberts Aff., 1-2, Rogers Aff., 1, Lyne Aff., 1-2, Hazard Aff., 1.

*** R. 204, Roberts Aff., 2, Rogers Aff., 2, Lyne Aff., 2, Hazard Aff., 2.

The members of the SIA have a similarly direct and substantial interest in outstanding school district bonds throughout the nation, all of which would be affected by this Court's decision in this case. Approximately $50 billion of public school bonds were issued in the United States during the 25 years 1946-1971, and at least 90% of these bonds were underwritten and distributed by SIA members (R. 204, Masterson Aff., 1). $3.9 billion of public school bonds were sold in 1970-1971 alone.* The national total of public school bonds outstanding on June 30, 1970 was more than $31.5 billion.** It is estimated that 95% of these bonds have remaining maturities ranging from one to twenty years, and 57% have remaining maturities ranging from five to twenty years.*** The continuing collectibility of the property taxes which support these bonds will thus remain of vital importance for years to come.

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* U. S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-71 (DHEW Publication No. (OE) 72-63), at 11 (1972).

** U. S. Bureau of the Census, Governmental Finances in 1969-70 (Series GF-70, No. 5), at 28 (1971).

*** According to estimates based on SIA data for state and local general obligation bonds as a whole (which include virtually all public school bonds), the distribution of the time remaining at December 31, 1971 until maturity of such bonds was as follows:

1-4 Years	$39.4 Billion (37.2%)
5-9 Years	$31.3 Billion (29.6%)
10-14 Years	$17.3 Billion (16.4%)
15-19 Years	$11.9 Billion (11.2%)
20 Years or More	$ 5.9 Billion (5.6%)

Statement

1. The Nature of Texas School District Bonds

Article 7, § 3 of the Texas Constitution authorizes the Texas Legislature to establish school districts and to permit them to levy and collect ad valorem property taxes. Pursuant to this authorization, the Legislature has authorized Texas school districts to issue negotiable coupon bonds "for the construction and equipment of school buildings in the district and the purchase of the necessary sites therefor," provided that both the issuance of the bonds and the levying of the property taxes necessary to pay them are authorized by the voters of the district in a special bond and tax election. Texas Educ. Code §§ 20.01, 20.04. Before such bonds may be issued, they must be approved as properly authorized by the Attorney General of Texas and registered by the Comptroller of Public Accounts,

> "and after such approval and registration such bonds shall be incontestable in any court, or other forum, for any reason, and shall be valid and binding obligations in accordance with their terms for all purposes." Texas Educ. Code § 20.06.

General bond market practice also conditions the sale of school district bonds to investors upon the unqualified approving opinion of recognized bond counsel (R. 199, 7-8). Both the Attorney General of Texas and bond counsel require as a condition of their approval a "no-litigation certificate" by the issuing school district that it knows of no pending or threatened litigation in any manner questioning the validity of the bonds or the levying of property taxes to pay them (R. 199, 6-7, Ex. B). The certificate of the Comptroller of Public Accounts attesting the approval

of the Attorney General and, in most cases, the approving opinion of bond counsel are set forth in full on the bonds themselves (R. 199, Ex. A).

Texas school district bonds are payable solely from ad valorem taxes levied on property within the district. *See* Texas Educ. Code § 20.01. A specific rate of property tax is levied each year to pay each specific issue of bonds, and the funds collected therefrom become trust funds for the benefit of the bondholders and may not lawfully be expended for any other purpose. *Love* v. *City of Dallas*, 120 Tex. 351, 367-68, 40 S.W.2d 20, 27 (1931); *McPhail* v. *Tax Collector*, 280 S.W. 260, 265 (Tex. Civ. App. 1926). If the bonds are not paid, the bondholders' only remedy is by mandamus to compel the school district to levy the specific property tax to pay the principal and interest on the defaulted bonds. *City of Waco* v. *Mann*, 133 Tex. 163, 174, 127 S.W.2d 879, 885 (1939). The property of a Texas school district has been held not to be subject to execution or garnishment. *National Surety Corp.* v. *Friendswood Ind. School Dist.*, 433 S.W.2d 690, 694 (Tex. Sup. Ct. 1968).*

* The principle that an obligation of a Texas school district may not be enforced by execution or garnishment applies to all school district obligations, not merely to school district bonds. For this reason, the District Court's Clarification of Original Opinion in the present case protects any outstanding or interim "contractual obligation incurred by a school district in Texas for public school purposes". *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971). The need to protect outstanding and interim-issued school district bonds is especially acute, however, for two reasons: (1) such bonds, unlike other obligations, are negotiable instruments backed by an express pledge of property tax revenues whose validity is certified by the Attorney General of Texas and upon which bond purchasers rely; and (2) such bonds are of much longer duration than other contractual obligations of school districts. Texas school district bonds may have maturities of up to forty years, Texas Educ. Code § 20.01, while other contractual obligations are limited to shorter periods. *See, e.g.*, Texas Educ. Code §§ 12.29(a) (textbook adoption

Most public school bonds elsewhere in the nation are likewise supported by local property taxes and other local taxes.* Thus an affirmance of the District Court without making clear that outstanding and interim-issued bonds will be protected would have severe repercussions not only in Texas but throughout the country.

2. The District Court's Clarification of Original Opinion

On December 23, 1971 the three-judge District Court issued its decision in the present case holding that the present Texas system of financing public education denies equal protection and enjoining (after a two-year stay) the enforcement of Article 7, § 3 of the Texas Constitution, the State constitutional basis for all Texas school district property taxes. *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 285-86 (W.D. Tex. 1971). The question of the continuing enforceability of outstanding and interim-issued Texas school district bonds had not been raised by any party, and the District Court's decision was silent on this question. For this reason it had a devastating impact upon Texas school district bonds.

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contracts; six years), 13.102 (teachers' probationary contracts; three years), 13.107 (teachers' continuing contracts may be terminated at end of any year "because of necessary reduction of personnel"), 23.28(b), (c) (employment contracts; three or five years), 23.76 (depository banks; two years).

* Putting aside revenue bonds, over 90% of the public school bonds sold in 1970-1971 were sold by school districts and other local bodies. *See* U. S. Department of Health, Education, and Welfare, Bond Sales for Public School Purposes 1970-71 (DHEW Publication No. (OE) 72-63), at 6, 14 (1972). Property taxes are estimated to comprise 97 to 98% of all local school tax revenues. Moore, *Local Nonproperty Taxes for Schools*, in Johns, Alexander & Stollar, eds., Status and Impact of Educational Finance Programs (National Educational Finance Project, Volume 4), at 209-10 (1971).

Neither the Attorney General of Texas nor bond counsel for issuers were able to approve Texas school district bonds issued after the decision (R. 199, 7-10). The sale of such bonds halted abruptly (R. 199, 10), and only resumed after the District Court's Clarification of Original Opinion was issued on January 26, 1972. The value of outstanding Texas school district bonds fell immediately after the decision (R. 199, 10).

Defendants, joined by the SIA as *amicus curiae* and by other *amici*, urged the District Court to clarify its decision to specify that it was not intended to affect the continued collectibility of property taxes levied to pay outstanding and interim-issued bonds (R. 184, 192, 199). The SIA took no position on the merits of the District Court's decision. The SIA explained that in order to safeguard the value and marketability of outstanding and interim-issued bonds it was necessary to insure the collectibility of property taxes to be levied to pay such bonds after the ultimate disposition of the action (R. 199, 10-11). The District Court's Clarification of Original Opinion dated January 26, 1972 expressly insured such continuing collectibility. *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 286 (W.D. Tex. 1971).

The purpose of the present brief is to urge this Court, if it should affirm the District Court, to make clear that the District Court acted rightly in issuing its Clarification of Original Opinion to protect outstanding and interim-issued Texas school district bonds.

3. Judicial Protection of Outstanding and Interim-Issued Bonds in Other Jurisdictions

All of the courts which have held that the present system of financing public education denies equal protection have assured bond investors that this holding does not under-

mine the enforceability of outstanding and interim-issued school district bonds. This assurance has taken diverse forms, but in all three cases which have gone to final judgment—the present case and the cases in Arizona and New Jersey—it has taken the form of an express provision in the final judgment safeguarding the continuing collectibility of property taxes levied to pay outstanding and interim-issued bonds.

California. On August 30, 1971 the California Supreme Court held that the present California system of financing public education denies equal protection under the Federal and State Constitutions. *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). There was widespread concern that the *Serrano* decision might be construed as affecting outstanding and interim-issued bonds, and many school bond issues across the country were withdrawn or postponed indefinitely.*

On October 21, 1971, in response to this concern, the California court issued a Modification of Opinion adding the following paragraph to its original opinion:

> "In sum, we find the allegations of plaintiffs' complaint legally sufficient and we return the cause to the trial court for further proceedings. We emphasize, that our decision is not a final judgment on the merits. We deem it appropriate to point out for the benefit of the trial court on remand (see Code Civ. Proc. § 43) that if, after further proceedings, that Court should enter final judgment determining that the existing system of public school financing is unconstitutional and invalidating said system in whole or in part, it may properly

* *E.g.*, *American Banker*, Nov. 11, 1971, p. 1; *Daily Bond Buyer*, Nov. 15, 1971, p. 1.

> provide for the enforcement of the judgment in such a way as to permit an orderly transition from an unconstitutional to a constitutional system of school financing. As in the cases of school desegregation (see Brown v. Board of Education (1955) 349 U.S. 294) and legislative reapportionment (see Silver v. Brown (1965) 63 Cal.2d 270, 281), a determination that an existing plan of governmental operation denies equal protection does not necessarily require invalidation of past acts undertaken pursuant to that plan or an immediate implementation of a constitutionally valid substitute. Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect." 5 Cal. 3d at 618, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

Minnesota. In a Memorandum and Order filed on October 12, 1971 the United States District Court for the District of Minnesota denied defendants' motion for summary judgment and held that the present system of financing public education in Minnesota violates the Equal Protection Clause. *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). The court made clear that it did not intend its holding to have any immediate effect upon school financing; it did not direct any affirmative relief, but deferred to the action of the Minnesota Legislature. 334 F. Supp. at 877.

Wyoming. On December 14, 1971 the Supreme Court of Wyoming adopted the *Serrano* principle. *Sweetwater County Planning Committee* v. *Hinkle*, 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972). The Wyoming court stated, however, that "[n]o invidious discrimination

will be involved if bonds are voted by any school district for capital improvements, and if special levies are made within the district to retire such bonds." 491 P.2d at 1238. Since school bonds may be issued in Wyoming only for capital improvements, *see* Wyo. Const., Art. 16, § 5; Wyo. Stat. § 21.1-253, this statement obviated any question as to the continuing validity of Wyoming school bonds.

New Hampshire. The New Hampshire Supreme Court held on December 23, 1971 that a city council was required to furnish the board of education with funds required to meet state minimum standards. *Laconia Bd. of Educ.* v. *City of Laconia*, 285 A.2d 793 (N.H. 1971). It refused to consider a belated argument that such a holding would violate the *Serrano* principle, in part on the ground that *Serrano* was not made retroactive:

> "Thirdly, it is doubtful that any consideration of this contention would have any retroactive effect whatever result was reached. See October 21, 1971 modification of opinion in Serrano v. Priest *supra* reported in 40 U.S.L.W. 2339 where it was stated that the 'existing system of school financing is to remain in effect until it has been found unconstitutional and replaced by an appropriate new system'." 285 A.2d at 796-97.

New Jersey. On January 19, 1972 the New Jersey Superior Court held that the present system of financing public education in New Jersey violates the Equal Protection Clauses of the Federal and State Constitutions and the Education Clause of the State Constitution. *Robinson* v. *Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972). It made clear, however, that

> "this declaration shall operate prospectively only and shall not prevent the continued operation of the school system and existing tax laws and all actions

> taken thereunder. This declaration shall not invalidate past or future obligations (such as school bonds, anticipation notes, etc.) incurred under the provisions of existing school laws and tax laws. Said laws shall continue in effect unless and until specific operations under them are enjoined by the court." 118 N.J. Super. at 280, 287 A.2d at 217.*

Arizona. On June 1, 1972 the Arizona Superior Court entered a declaratory judgment that the present Arizona system of financing public education violates the Federal and State Equal Protection Clauses. *Hollins* v. *Shofstall*, Ariz. Super. Ct., Maricopa County, No. C-253652, June 1, 1972. On June 6, 1972 the court issued a Supplemental Memorandum making clear that it intended to protect the continued enforceability of outstanding and interim-issued bonds throughout their entire life:

> "Notwithstanding anything to the contrary stated in the memorandum and order of June 1, 1972, it is the intention of the court that general obligation bonds heretofore or hereafter issued by school districts shall enjoy full and complete security afforded by the applicable bond-enabling statute, and the bondholder shall have recourse to the levy of an ad valorem tax upon all taxable property within the district to compel the payment of the principal of and interest on such bonds, throughout their entire life and as the same shall become due, in the event that funds for the payment of such bonds are not lawfully available from other sources."

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* Paragraph 7 of the Judgment entered on February 4, 1972 in *Robinson* v. *Cahill* provided even more explicitly that "nothing herein shall be deemed to limit, impair or affect any bonds heretofore or hereafter issued or authorized for public school purposes, or any notes or other obligations at any time authorized or issued in anticipation of such bonds, or any taxes levied or required to be levied with respect to any such bonds, notes or other obligations . . . ."

Summary of Argument

1. As no appeal has been taken from the portion of the District Court's judgment which protects outstanding and interim-issued bonds, it is therefore not actually before this Court for review. Nevertheless, if the Court affirms the decision of the District Court, we respectfully submit that the Court should make clear that the decision will not affect outstanding and interim-issued bonds, in order to prevent the disruption of school bond markets throughout the nation which might otherwise result.

2. This Court's decisions, especially *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam), and *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 213-15 (1970), which are almost exactly in point, establish that the District Court's decision should not be retrospectively applied. Retrospective application is wholly unnecessary to achieve the purpose of the District Court's holding, and would be strikingly unjust in light of bondholders' reliance upon express legal opinions and representations by the issuers that the bonds are supported by valid and enforceable property taxes.

3. Retrospective application of the District Court's holding would also offend the constitutional values embodied in the Contract Clause and the Due Process Clause. The Equal Protection Clause should not be unnecessarily applied in a manner which brings it into conflict with these coordinate constitutional values.

ARGUMENT

I

This Court Should Reaffirm the District Court's Protection of Outstanding and Interim-Issued Bonds

The District Court's Clarification of Original Opinion issued on January 26, 1972 stated that its decision and order of December 23, 1971 in no way affected the continuing collectibility of property taxes levied to pay outstanding bonds and interim-issued bonds issued and delivered before December 23, 1973, by which time the District Court anticipated that the present system of financing public education in Texas would be replaced by a constitutional system.* *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 285-86 (W.D. Tex. 1971).

Defendants have not appealed from this portion of the District Court's order, and plaintiffs have taken no appeal.** It follows that the portion of the District Court's order which protects outstanding and interim-issued bonds may not be disturbed in this Court. *See, e.g., Swarb* v. *Lennox*, 405 U.S. 191, 201-03 (1972); *Morley Construction Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191-92 (1937).

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* We have spoken in this brief of the need to protect interim-issued bonds issued and delivered prior to the ultimate disposition of this action, rather than interim-issued bonds issued and delivered before December 23, 1973, for two reasons: (1) the necessary transitional period, if the District Court's holding is affirmed, will differ from state to state and may be longer or shorter than two years; and (2) while the District Court's judgment requires the State of Texas to act before December 23, 1973, final judicial approval of a new system of public school financing might not take place until a later date.

** Indeed, plaintiffs represented to the District Court, in order to induce it to deny the motion made by the SIA and the four *amici* banks for permission to intervene, that they would not seek to overturn the District Court's clarification insuring the continuing enforceability of outstanding and interim-issued bonds (R. 207, 28-29).

We nonetheless respectfully urge the Court, if it should affirm the decision of the District Court, to make clear that its decision should only be applied prospectively from the ultimate determination of the action, and should not affect the continued collectibility of property taxes to be levied to pay outstanding and interim-issued school district bonds. Otherwise, especially in view of the numerous similar cases now pending in many jurisdictions,* this Court's decision might have the same sharply disruptive effect upon school bond markets throughout the nation as the initial decision of the District Court had in Texas, and would draw into question the rights of holders of more than $31.5 billion in outstanding public school bonds. Such a disruptive shock, even if later corrected, might permanently lessen public confidence in the security of public school bonds.**

II

This Court's Decisions Establish That the District Court's Holding Should Not Be Applied Retrospectively

The District Court's holding that its decision should be applied only prospectively is squarely supported by two decisions of this Court, also involving local government

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* A partial summary of these cases, listing 24 cases in 15 states, is given in Comment, *The Evolution of Equal Protection: Education, Municipal Services, and Wealth*, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 103, 200-13 (1972).

** It is to avoid such adverse consequences that the courts which have held that existing school financing systems deny equal protection have assured bond investors that this holding does not affect outstanding and interim-issued bonds (*see* pp. 8-12 *supra*). Similarly, a New York trial court declined to anticipate the decision of this Court on the basic equal protection issue in order to avoid "placing the sword of Damocles over school bond financing in this State for the next several years." *Spano* v. *Board of Educ.*, 68 Misc. 2d 804, 808, 328 N.Y.S.2d 229, 234 (Sup. Ct. Westchester County 1972).

bonds and the Equal Protection Clause, which are almost exactly in point. In *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam), this Court ruled that the franchise in a municipal revenue bond election cannot constitutionally be limited to property taxpayers, but held that this decision should be given prospective effect only:

> "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the 'injustice or hardship' by a holding of non-retroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). Cf. *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Therefore, we will apply our decision in this case prospectively."

Just as in *Cipriano*, a decision retrospectively wiping out the sole security for Texas school district bonds would impose "significant hardships" and "produce substantial inequitable results". As in *Cipriano*, such an injustice should be avoided by a holding of nonretroactivity.

In *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 213-15 (1970), this Court extended *Cipriano* to voting on municipal general obligation bonds, and likewise held that its decision should be given prospective effect only. The District Court's holding of nonretroactivity in the present case is identical to *Cipriano* and *Kolodziejski*, except that the District Court made its decision prospective from December 23, 1973, by which time the District Court anticipated that a new system of financing public education would be

instituted. This difference is a practical necessity because the pressing capital needs of school districts must continue to be met by the issuance of bonds under the present system until another system has been finally approved by the Legislature and the Courts.

This Court recently summarized the three key factors bearing on the question whether a new decision should be applied retroactively in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971): (1) whether the effect of the decision is to "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retroactive application of the decision would further or retard its purpose; and (3) whether retroactive application would produce substantial inequitable results. All three of these factors argue strongly against retrospective application of the District Court's decision in the present case.

Although, as already stated, the SIA and the *amici* banks do not wish to and do not take any position with respect to the merits of the present appeal, there can be no question that a decision by this Court affirming the judgment of the District Court would "establish a new principle of law". So far as we are aware, no action challenging the validity of existing systems of financing public education under the Equal Protection Clause was ever brought until 1968. When such cases were brought, this Court twice sustained existing systems against equal protection attacks. *See McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969); *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970). We recognize that the

District Court held *McInnis* and *Burruss* to be distinguishable from its decision, *Rodriguez* v. *San Antonio Ind. School Dist.*, 337 F. Supp. 280, 283-84 (W.D. Tex. 1971), and take no position with respect to the validity of the distinction on the merits; but we respectfully submit that, even accepting the distinction, the District Court's decision was not "clearly foreshadowed" by any decision of this Court.

The second factor recognized in *Chevron Oil Co.* v. *Huson* is the purpose of the new decision. *See also Desist* v. *United States*, 394 U.S. 244, 249-50 (1969); *Linkletter* v. *Walker*, 381 U.S. 618, 636-37 (1965). The purpose of the District Court's holding—removing disparities in educational expenditures arising from disparities in taxable wealth—does not require the elimination of the property taxes needed to pay outstanding and interim-issued bonds. It merely requires that, without altering school districts' duty to levy property taxes to pay outstanding and interim-issued bonds as they have solemnly contracted to do, the State adjust the allocation of remaining State and school district educational funds to insure that any constitutionally mandated balance of educational expenditures is achieved.* The thrust of *Serrano* and the decisions that have followed it, including the decision of the District Court, is to condemn the end result of the school financing system, not any specific component of the collective source of funds.

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* Some courts have held that the *Serrano* principle serves the additional purpose of equalizing the property tax burden on taxpayers in different school districts. *See, e.g., Robinson* v. *Cahill*, 118 N.J. Super. 223, 276-80, 287 A.2d 187, 215-16 (1972). This purpose can likewise be met by statewide redistribution of educational funds without disturbing the property tax security for outstanding and interim-issued bonds.

Finally, it is plain that retrospective application of the District Court's decision would produce substantial inequitable results, the third factor identified in *Chevron Oil Co.* v. *Huson.* Investors acquired outstanding Texas school district bonds in reliance upon express representations by the issuers and legal opinions of bond counsel and the Attorney General of Texas that the bonds were valid obligations supported by an enforceable duty to levy ad valorem taxes on property within the issuing school district. These opinions, indeed, were commonly printed on the face of the bonds themselves, which are fully negotiable. Without these opinions, the bonds could not have been sold. In reliance upon these opinions, the bonds have been accepted as investments not only by numerous individuals but also by the *amici* banks and many other institutions for their own account and as trustees for charitable, testamentary, and other trusts. Under these circumstances, to apply the District Court's decision retroactively so as to wipe out the property tax security for the bonds would be strikingly unjust. The District Court correctly made clear that it intended no such result.*

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* This Court recognized the injustice of retroactively invalidating bonds as early as *Gelpcke* v. *City of Dubuque,* 68 U.S. (1 Wall.) 175, 205-07 (1863), which held that bonds whose validity had been upheld by the highest State court would be recognized in a federal court despite an overruling decision by the State court. Although the precise holding of *Gelpcke* v. *City of Dubuque* has probably been overruled by *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 69 n.1 (1938), its underlying principle was discussed with approval in *Linkletter* v. *Walker,* 381 U.S. 618, 624-25 (1965).

III

Retrospective Application of the District Court's Holding Would Offend the Principles Embodied in the Contract Clause and the Due Process Clause

Retrospective application of the District Court's holding to outstanding and interim-issued bonds would contravene the principle of governmental good faith embodied in the Contract Clause. This Court has long held that a State may not, under the Contract Clause, withdraw a power to tax which has been made the basis for bonds which are still outstanding. *E.g., Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 554-55 (1866). Under this principle the District Court's holding could not be utilized as a ground for legislative repeal of the property taxes supporting school district bonds, because such invalidation is not necessary to achieve the purpose of the District Court's holding, and the decisions of this Court establish that governmental obligations may not be repudiated unless "the extent of the repudiation is only that which is reasonably necessary to effectuate a valid objective". Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 244 (1960).

Retrospective application of the District Court's holding would also run counter to the values embodied in the Due Process Clause. It would drastically change the nature of the bondholders' contracts because of a constitutional problem which they did not cause and from which they derived no benefit. If it were sought to be legislatively imposed, such an imposition of a burden upon a group which did not cause or benefit from the underlying problem would deny due process of law. *Cf., e.g., Atchison, T. & S.F. Ry.* v. *Public*

Util. Comm'n, 346 U.S. 346, 352-53 (1953); *Nashville, C. & S.L. Ry.* v. *Walters*, 294 U.S. 405, 428-32 (1935).

The principles embodied in the Contract Clause and the Due Process Clause are of coordinate dignity with the principle of equality embodied in the Equal Protection Clause. Wherever possible, such coordinate constitutional principles should be accommodated, as this Court has observed, for example, with respect to the Establishment and Free Exercise Clauses of the First Amendment. *E.g.*, *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668-72 (1970). This consideration strongly supports the conclusion of the District Court that its decision should not be retrospectively applied.

CONCLUSION

For the reasons given above, Republic National Bank of Dallas, First City National Bank of Houston, Mercantile National Bank at Dallas, Bank of Texas, and Securities Industry Association, Inc., respectfully urge the Court, if it should affirm the decision of the District Court, to make clear that the District Court correctly held that its decision should in no way affect the continuing collectibility of property taxes to be levied to pay the principal and interest on Texas school district bonds outstanding at the time of the District Court's decision or authorized and issued prior to the ultimate disposition of this action.

Dated: July 21, 1972

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Supreme Court, U.
FILED
JUL 22 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-9611-12

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Appellees.

On Appeal from the United States District Court for the Western District of Texas

Interest of the *Amicus*

The State of New Jersey is filing a separate *amicus curiae* brief in this matter because of its extreme importance to the State and also because an examination of the system of public school financing in New Jersey, and recent efforts to change it, may illustrate in concrete terms the practical implications for a particular state of the present campaign to read far-reaching requirements with respect to public school financing into the Equal Protec-

tion Clause of the Fourteenth Amendment. The brief does not attempt to present a full length argument for reversal of the district court judgment, since those arguments have already been fully set forth in the brief for the appellants, nor does it canvas all posible ramifications of acceptance of appellees' constitutional theories, since this has been done in the *amicus* brief of Montgomery County, Maryland and the State of Maryland, et al. Rather, the objective of the brief is to set forth the particular significance of the case to the State of New Jersey, which is actively seeking reform of public school financing through its legislative and executive branches but at the same time takes the position that the imposition of such change by judicial decree is neither authorized by the Equal Protection Clause of the Fourteenth Amendment nor desirable as a matter of policy if appropriate balances are to be maintained between the federal and state governments and between the judicial and legislative branches.

The present system of financing public school education in New Jersey, enacted as chapter 234 of the Laws of 1970, resulted from the recommendations of a joint legislative and executive commission which spent more than two years studying alternative proposals to improve educational financing. The program of state aid enacted by the Legislature pursuant to the Commission's recommendations, known as "incentive equalization aid," guarantees each district in the State at least $30,000 in equalized valuations per pupil for purposes of raising operating revenues through local property taxation. This amount of guaranteed equalized valuation may be raised as high as $45,000 for a particular school district if it improves the quality of its educational program. If a district has less than the guaranteed quantum of ratables per pupil available, then the State makes up the difference by distributing aid in an amount that allows a district to levy a tax

as if it had the greater amount of ratables per pupil. In determining the number of pupils in a district, the legislation includes a "weighting" factor which in effect causes each pupil from a family receiving aid under the Aid to Families With Dependent Children program to count as 1.75 pupils, thus providing more State aid to poorer districts. Due to the fiscal problems now being encountered by the State of New Jersey, this new program is only partially funded at the present time.

Shortly after assuming office, Governor William T. Cahill created by Executive Order No. 5 of 1970 a Tax Policy Committee which was given the responsibility of studying the entire structure of revenue raising and allocation of the costs of governmental services among the various levels of government in New Jersey. Nearly two years later, the Committee transmitted its report and recommendations, consisting of six volumes and nearly 500 pages, to the Governor. Regarding public school education, one of the main subjects of the report, the Committee noted that while most people agree upon the goal of equality of educational opportunity, there is substantial disagreement as to what it is:

> "There are substantial disagreements as to what constitutes equality of educational opportunity. Among standards discussed are equal expenditures per pupil, equal taxable valuations per pupil, a specified limit to variations among districts, specified minimum attainments such as ability to read by age 9, allocation of resources in accordance with ability to pay, and development of the full potentialities of all pupils." *Summary Report of the New Jersey Tax Policy Committee*, p. 16 (Trenton, N. J. 1972).

After consideration of all aspects of public financing in New Jersey, the Committee concluded that "the time has

come for substantially full funding of the public elementary and secondary school system by the state government." Id. at 17. But while the Committee recommended that the State assume responsibility for all the operating costs of a "standard quality education," it also concluded that local school districts, by public referendum, should be allowed to expend additional amounts to attain a superior system of education for the children residing therein. The State would continue to participate in such additional educational expenditures, in accordance with a formula based upon the equalized valuation per pupil of real property in the district, up to an amount one-third greater than that determined to be necessary for a "standard quality education." In recognition of the fact that the cost of a "standard quality education" is not the same in every school district, the Committee also recommended that additional amounts continue to be alloted to districts in accordance with the number of pupils from families receiving AFDC benefits and that regional cost differences be taken into account. The Committee further recommended that a regional collective bargaining system for teachers' salaries and fringe benefits be established in connection with the assumption by the State of substantially all funding of public education.

At about the same time that the Governor's Committee began its investigation of the tax structure of New Jersey, a suit was filed challenging the validity under the State and Federal Constitutions of the present system of financing public school education in New Jersey. One month before the Committee issued its report, the trial court before whom the case had been brought issued an opinion declaring the entire present system of financing public schools in New Jersey to be unconstitutional and ordered the Legislature to enact a "nondiscriminatory system of taxation" prior to

January 1, 1973. *Robinson* v. *Cahill,* 118 N. J. Super. 223, 280 (Law Div. 1972). The opinion nowhere indicates what specific legislative amendments will be required to satisfy the trial judge's conception of a "nondiscriminatory system of taxation." Would a uniform state real property tax or increase in the state sales tax suffice, even though such taxes are generally considered to be regressive, or is the Legislature required to fund education through an income tax? The court also declined to determine whether its constitutional theories would require invalidation of any local expenditures for public education beyond the state funding needed to provide an adequate education. 118 N. J. Super. at 278 n. 21. The court further ordered that if the Legislature does not act by January 1, 1973, then some of the funds which the Legislature has previously appropriated to implement the duly enacted present system of public school financing are to be redistributed in a manner which will satisfy the court's notions of equality. The Attorney General has appealed from this judgment to the Supreme Court of New Jersey, where the matter is now pending.

On May 18, 1972 Governor Cahill delivered to the Legislature a message entitled, "A Master Plan for Tax Reform," which urged the enactment of legislation embodying the recommendations of the Tax Policy Committee. The primary means proposed to pay for a "standard quality education" wholly from State revenues were an income tax and a 1% State tax on real property. The Governor also took specific note at p. 41 of his message of recent equal protection challenges to the school financing law, and expressed the hope that the efforts of some school districts to provide superior educational programs would not be thwarted by judicial mandate:

> "Localities must be permitted to supplement State funds with local resources as the people from each

> community determine the wisest course for the education of their children. I recognize there are unresolved constitutional differences in this area. Unless judicially mandated to the contrary, we should not foreclose a district where the citizens desire to provide the ultimate in educational programs."

The tax reform bills proposed by Governor Cahill were introduced in the New Jersey Legislature, but initial attempts to secure enactment have been unsuccessful.

The State of New Jersey is therefore currently operating under the "incentive equalization aid" program described in the second paragraph of this brief, as modified by the trial court order directing certain redistribution of funds appropriated for this program if the Legislature does not enact "non-discriminatory system of taxation" by next January 1. Since the trial court judgment is based partly on State constitutional grounds, a decision favorable to the appellant in this case would not be dispositive of the pending challenge to the New Jersey system of financing public school education. However, an affirmance of the district court judgment would result in the imposition upon New Jersey by judicial decree of a system of school financing with an immense impact not only on the educational and fiscal programs of the State, but also on the fundamental allocation of responsibility for public services among the different levels of government, which the people of the State, through their duly elected representatives in the Legislature, have only recently refused to modify. Such alteration of the tax structure and responsibility for public services in New Jersey by the federal judiciary would be fundamentally inconsistent with basic democratic principles. Furthermore, even if the view is taken that the end result

of "equality of educational opportunity" justifies departure from the normal process of democratic decision making, there is substantial disagreement as to what system meets this ideal. This makes the entire subject an inappropriate one for resolution by constitutional adjudication, because the judicial decision making process lends itself to the establishment of an inflexible rule of "equality" of educational opportunity in accordance with the views in vogue at the present time which further study may show to be imperfect. Thus, the present system of "power equalization" contained in the New Jersey law is considered by most people to be a progressive system to achieve the goal of "equality of educational opportunity" even though inequalities may occur with respect to districts which have ratables per pupil in excess of the guaranteed level or which vote to spend more than neighboring communities on education, but that system has been held to be in conflict with the Equal Protection Clause. *Robinson* v. *Cahill, supra,* 118 N. J. Super. at 207-80. So too the proposals of the Tax Policy Committee are almost universally thought to be progressive social measures which would still further improve the system of educational financing in New Jersey. However, the recent cases discerning in the Equal Protection Clause a rigid requirement of equality of expenditures for education cast substantial doubt on the validity of the proposal to allow local school districts to spend more than the sum appropriated by the state to provide a "standard quality education." It is clear, therefore, that the State of New Jersey, along with the other states participating as *amici curiae* in this matter, has a vital interest in preserving the authority of its Legislature to adopt provisions for financing public education which are consistent with its views of proper allocation of functions among the various levels of government, and which will enable local school districts to provide the highest quality education possible.

ARGUMENT

The State interest in local control of education constitutes a rational basis for delegating the primary responsibility for public education, including the power to raise necessary revenues, to local school districts.

A party who challenges the validity of legislation under the Equal Protection Clause of the Fourteenth Amendment generally bears the heavy burden of demonstrating that the Legislature has acted in an invidiously discriminatory or palpably unreasonable manner. *Jefferson* v. *Hackney*, —— U.S. ——, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972). The principles governing equal protection in any challenge were most recently summarized in *Schilb* v. *Kuebel*, 404 U.S. 357 (1971):

> "'The prohibition of the Equal Protection Clause goes no further than invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). 'Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."' *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809 (1969). The measure of equal protection has been described variously as whether 'the distinctions drawn have some basis in practical experience,' *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966), or whether the legislature's action falls

short of 'the invidious discrimination,' *Williamson* v. *Lee Optical Co., supra,* 348 U.S., at 489, or whether 'any state of facts reasonably may be conceived to justify' the statutory discrimination, *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); see *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4, 6 (1970), or whether the classification is 'on the basis of criteria wholly unrelated to the objective of [the] statute,' *Reed* v. *Reed,* 404 U.S. ——, ——, 92 S. Ct. 251, 254, 30 L. ed. 225 (1971)."

The same principles clearly control any equal protection challenge to the assessment of taxes (*Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1937)) or allocation of government revenues. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). In *Dandridge* the Court rejected a claim that a Maryland welfare regulation, establishing a maximum grant for any AFDC family, denied equal protection to children in large families, saying:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 61, 78." 397 U.S. at 485. See also *Jefferson* v. *Hackney, supra.*

In this case the disparities in expenditures for education among children and in the taxes assessed by different school districts are simply by-products of the legislative determination to delegate the primary responsibility for

public education to the local school districts of the State. From an early date in our history each school district has been considered "a miniature democracy where the people, within certain limits, enact their own laws, levy their own taxes, and choose their own officers," which thereby fosters "a spirit of vigorous self-government." 1 Howard, *Local Constitutional History of the United States,* 234-236. Local self-government in the area of education is only one aspect of the home rule principle, which also involves local decision making with regard to police and fire protection, health, land use planning and various other areas vital to the health, safety and welfare of the citizenry. This principle is so fundamental that it even finds expression in the New Jersey Constitution, *Art.* IV, § 7, para. 11, also *Art.* IV, §7, paras. 8, 9(7), (11), (12) and (13), and 10.

Moreover, there are substantial policies which are served by the legislative emphasis on local responsibility for education. The fact that the educational accomplishments of the local children immediately affect the well-being of the district acts as an incentive to the citizens thereof to allocate sufficient sums for educational purposes. At the same time, the fact that local tax revenues are allocated for this purpose motivates the citizens of the area to prevent wasteful and unnecessary expenditures. Such planning at the local level also allows the citizens to weigh carefully the various services to be provided by the local governmental unit and to determine what percentage of the tax revenues shall be allocated for each one. As a natural and expected consequence of such local control, diversity exists throughout the State in the amount of money spent on education. However, these differences are not mandated by the Legislature, nor do they result

from a legislative policy which separates the wealthy from the poor. The Legislature has simply recognized the value of community control and has entrusted to the local school district the duty to provide for the education of the children residing therein.

Since there is a rational basis for reposing the primary responsibility for public education with local school districts, the controlling Federal and State case law leave no doubt that this legislative judgment is consistent with the equal protection guarantees of the Federal Constitution. In *James* v. *Valtierra*, 402 U. S. 137 (1971), the Court upheld the power of local governmental units to exclude low-income housing projects from within their boundaries through referendums mandated by the State Constitution. It found that the referendum which effectively excluded such housing was basically a procedure for democratic decision making, and since the State did not single out low income people desiring public housing for such mandatory referendums, it was constitutionally valid. The court said:

> "This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community." 402 U. S. at 143.

The position of prospective low income residents of a municipality which determines to exclude low income housing is akin to that of students in a municipality which does not make available funds for education comparable to those provided by a neighboring municipality. *See also Salsburg* v. *Maryland*, 346 U. S. 545 (1954); *West Morris Reg. Bd. of Ed.* v. *Sills*, 58 N. J. 464 cert. den. 404 U. S. 986

(1971); *United States ex rel. Buonoraba* v. *Commissioner of Cor.*, 316 F. Supp. 556 (S. D. N. Y. 1970).

The ultimate jurisprudential question posed by the decision below and the cases which have followed it is whether such judicial activism can be reconciled with basic democratic principles. As set forth in the interest of the *amicus* portion of this brief, the New Jersey Legislature, duly elected by the people of this State, has determined to delegate the primary responsibilty for public education to local school districts. This determination has far-reaching implications with respect to the structure of state government, the exercise of the power of taxation, and the allocation of governmental revenues. *See* Kurland, *Equal Protection Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. of Ch. L. Rev. 583 (1968). These are all areas of controversy primarily entrusted to the Legislature to resolve in conformity with the will of the majority of the people, and not to be resolved for all time by the judiciary in accordance with notions of equality currently in vogue. In this respect, the legislative judgment challenged in this case is fundamentally different from questions of criminal procedure or the exercise of the franchise, with respect to which the judiciary has a primary responsibility for the protection of individual rights. *See e.g., Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Douglas* v. *California*, 372 U. S. 353 (1963). In fact, the active role which the court has assumed in voting rights cases such as *Harper* v. *Virginia Bd. of Elections* and *Reynolds* v. *Sims* is in furtherance of the fundamental democratic principle that all citizens have a right to cast an effective ballot to influence decisions concerning the structure of government, taxation, the distribution of governmental revenues and other matters of vital concern. This

point was well made in *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969) where the Court, in explaining its reasons for applying a strict standard of judicial review in votings rights cases, said:

> "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 395 U. S. at 628.

By contrast, the recent decisions invalidating state financing legislation on equal protection grounds do not protect the democratic political process, but to the contrary, they effectively remove one of the most important areas of public policy from that process. It is certainly not the function of courts to choose between competing claims for public revenues or conflicting educational and political theories. Even assuming that the present system of financing public education in many states leaves much to be desired, it should be remembered that ". . . the Constitution does not provide judicial remedies for every social and economic ill." *Lindsey* v. *Normet*, 404 U. S. 818 (1972).

CONCLUSION

The District Court failed to give due consideration to the equal protection principles governing this case set forth expressly in *Jefferson* v. *Hackney*, —— U.S. ——, 92 S. Ct. 1724, 32 L. ed. 2d 285 (1972); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); and *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937), and implicitly in the Court's summary affirmances in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), affirmed Mem. *sub nom.* *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969) and *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.* 397 U.S. 44 (1970). It is respectfully, submitted that the application of those principles to this case clearly demonstrates that the decision below is erroneous and therefore that it should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

INTERESTS OF AMICI CURIAE

Amici Curiae are representatives of state governments or political subdivisions in 30 states. Each such subdivision, like all American subdivisions, possesses systems of school financing inconsistent with the *Serrano-Rodriguez* doctrine. Each such subdivision, like all American subdivisions, has traditionally confided responsibility for the raising and allocation of public funds to its elected legislature. In consequence of the magnitude of the sums necessary to alter the system of school financing of each state and sub-

division to conform to the *Rodriguez* doctrine, each of the undersigned states and subdivisions would suffer severe financial stringency and interference with its ordinary budget making process and the democratic allocation of public resources within its borders.

The undersigned subdivisions have a common interest in resisting the imposition upon their fiscal choices in regard to taxing, spending, or the relation between them of the doctrine of judicial "strict scrutiny" which would be imposed upon educational and other spending decisions by plaintiffs and by the Court below. Each and all of the undersigned subdivisions rather favors the application to state taxing and spending decisions of those canons of restraint which have traditionally immunized such determinations, state and federal, from intensive judicial review. They believe required application of the standards which have traditionally governed judicial review of taxing and spending programs:

First, that "there need be no relation between the class of taxpayers and the purpose of the appropriation" (*New York Rapid Transit Company v. New York*, 303 U.S. 573 (1938)); "if the tax, qua tax, be good * * * and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the treasurer, neither is made invalid by being bound to the other in the same act of legislation." *Cincinnati Soap Company v. U.S.*, 301 U.S. 308 (1937), see *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937);

Second, that the appropriate standard by which state tax legislation is to be judged is the standard of *Madden v. Kentucky*, 309 U.S. 83 (1940): "In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature neces-

sarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88 (1940);

Third, that the appropriate standard for assessing state expenditure programs not involving racial distinctions peculiarly reached by the Fourteenth Amendment is that of *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) with its stress on the proposition that "the Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients", see *Steward Machine Company v. Davis*, 301 U.S. 548, 584-85 (1939); *Helvering v. Davis*, 301 U.S. 619, 644 (1939);

Fourth, that in a federal nation with strong traditions of local government whose constitution recognizes rights in property, the existence of differences in the average wealth of political subdivisions does not constitute in itself State action activating any standard of constitutional review: "the use of taxes in the county where the tax property is located does not, of itself constitute an invidious discrimination or unreasonable classification" (*Board of Education of Independent School District of Muskogee v. Oklahoma*, 409 F.2d 665 (10th Cir. 1969)). Since states "have the attributes of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests" (*Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959)), constitutional guarantees reach only action by the state and not "the inaction implicit in the failure to en-

act corrective legislation". *Adickes v. Kress and Company*, 398 U.S. 144, 167, note 39 (1970).

The present case, more than any other case before the Court in the last decade, constitutes a threat to the autonomy and independent existence of state and local governments and indeed to the power of the purse of legislatures that is the enduring and perhaps the most important legacy of seven centuries of Anglo-American constitutional history.

Since the brief of Texas treats fully the questions surrounding the applicable standard of review, the present memorandum will summarize the impact of the issues at stake in the present litigation upon the educational, social, revenue and expenditure policies of the signatory governments.

DANGERS OF A 'FUNDAMENTAL INTEREST' HOLDING

If this court accepts plaintiffs' invitation to pronounce educational finance a "fundamental interest" activating a strict standard of review, a wide range of other governmental programs, each of which can be plausibly represented as involving fundamental interests, will be open to attack. The emotional arguments surrounding the distribution of medical care, for example, are at least as compelling as those surrounding education.* Principles invoked with respect to elementary and secondary education can readily be extended to higher education in a society in which it is regarded as ever more essential.** The application of the

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* An organization known as the Medical Committee for Human Rights is presently orchestrating a barrage of lawsuits in this field. It no doubt will take a great interest in *Serrano*.

** Indeed, it is difficult to think of a more regressive area of public spending than higher education in which nearly all the benefits go to persons with the economic wherewithal to avoid joining the labor

principles contended for here to sewerage and public health funds, police funds, funds for transportation, and library funds can be readily envisaged.

Judicial intervention in this sphere will almost certainly be productive of the "generation of litigation" phenomenon similar to that following the *Brown* desegregation decision, but without a foreseeable end. Thus former Commissioner Howe has noted:

> "There would be a long period of adjustment and difficulty. Seventeen years have passed since the Supreme Court handed down the *Brown* decision, and the schools are still in the process of desegregation." (Howe, op. cit. page 38, *infra.*)

The backbiting that has already taken place among the proponents of judicial intervention is sufficient to indicate the Pandora's box that will be opened if the courts are permitted to venture into this sphere.

Thus, the work by Coons, Clune and Sugarman,* the most important influence on the California decision, is filled with scornful references to the complaint in *McInnis v. Shapiro* with its demand for compensatory relief and is also filled with scornful references to the earlier work by Wise, *Rich Schools, Poor Schools*, with its explicit demand for something closely approaching total state assumption of costs or equality in actual expenditure among districts. The Messrs. Coons, Clune and Sugarman profess to prefer a system under which the state would act to provide each district with equal taxing resources but in which the level of educational spending within each district would in part

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force before graduation from high school. Professor Coons has already suggested extension of the *Rodriguez* principle to publicly-supported junior colleges, 2 Yale Review of Law and Social Action at 120 note 32 (1971), describing them as an "inviting target".

* *Private Wealth and Public Education* (1969).

be a function of the willingness of district voters to tax themselves. Under this regime the education received by each child would, it is said, continue to be a function of the political sentiments of his neighbors, though not necessarily of his own sentiments or those of his parents. It is easy to envisage the welter of law suits which will ensue if this Coons thesis is accepted — suits, for example, by Protestant school children aggrieved at the low level of public school taxation in predominately Catholic cities, etc. The long term viability of the limitations proposed by Coons, Clune and Sugarman upon a doctrine of absolute equality would indeed be in doubt. Indeed, Mr. Wise, repaying the 'compliments' directed at him by Coons, Clune and Sugarman, has pointed out that the California decision does not clearly adopt the Coons-Clune-Sugarman rule. Wise, *The California Doctrine*, Saturday Review, November 20, 1971, pg. 78.

The Messrs. Coons, Clune and Sugarman would leave some nominal scope for local autonomy by merely equalizing district taxing resources. Mr. Wise would equalize both taxing resources and taxing rates. He would not go so far, however, as to prohibit the use of distinctions based on child characteristics in the allocation of educational funds. Professor Michelman of Harvard likewise is an enemy of the Coons approach, see Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. Law Rev., 7 at 54-59 (1970). Alleging that the Coons approach could result in inequities while an approach requiring equal expenditures for a foundation program with some local variations upward presents problems of justiciability, he, as noted, goes on to favor "insistence on channelling all the state's educational expenditures into the common pool." (83 Harvard Law Review at 58). Yet another legal commentator, Professor Kirp, not to be outdone, proclaims:

"Stressing the effectiveness of equal educational opportunity does however suggest that the school is obliged to exert its energies in overcoming initial differences that stem from variations in background, in home life (or lack of home life) and community * * * Focusing on effective equalization — an equal chance for equal achievement — stresses the obligation of the state to make a greater financial effort in those school districts whose needs are greater because their school children are less well prepared for school. The state has a constitutional obligation to develop schools which will compensate as fully as possible for inequalities of prior training and background. The cost of such an effort, seriously undertaken, will be immense; the result well worth the cost." (Kirp, *The Poor, The Schools and Equal Protection*, in Harvard Educational Review, *Equal Educational Opportunity* (1969) at 156, 169.)

Lest there be any doubt as to what this involves, Professor Kirp helpfully notes (Footnote 122 of his article):

"The Passow Report estimated the cost of compensatory education at 'three or four times the cost of meeting the educational needs of the child whose home environment has already done a good portion of the job even before the child enters school' (Passow, *Washington D. C. Public Schools*, page 259)".

Professor Kirp does however provide one helpful suggestion. He notes:

"The magnitude of the necessary effort may seem to some to represent an overreliance on schooling as a tool for social amelioration. While a court will not be able to choose among alternative social policies, (better schools or better housing or more jobs, etc.) it may, by denying plaintiff's claim, passively express its reluctance to order a major readjustment of fiscal and social priorities." (at 169 n. 122).

Lest it be thought that Professor Kirp's position is an extreme one, it should be noted that he too is outdone by Professor Samuel Bowles of Harvard. Professor Bowles set forth the ideal of "equality of education opportunity in terms of the economic results of education". Bowles, *Towards Equality of Educational Opportunity* in Harvard Review, *Equal Educational Opportunity* (1969) at 124. Professor Bowles goes on to urge:

> "The allocation of unequal amounts of resources for educating Negro as compared to White children and poor as compared to rich children." (at 115).

It is clear that there are as many versions of what the Constitution requires as there are professors of law and education, and that the courts, if they admit a significant judicial role in this sphere, will be subjecting themselves to a barrage of conflicting law suits by exponents of conflicting theories.*

Counsel coordinating the *Serrano* litigation has made clear that the decisions are deemed of value not for the actual results obtained, which may indeed be counterproductive in terms of the needs of urban districts ("Unless we are careful, we can be locked into a formula we don't like for over a decade" Myers, *Second Thoughts on the Serrano Case*, City Magazine, Vol. 5, No. 6 pg. 41 (Winter 1971) quoting Mrs. Sarah Carey, Assistant Director of the Lawyers' Committee), but rather for their holdings that education is a fundamental interest. Mrs. Carey has noted:

> "And then finally — and this is an issue the press has ignored totally — *if education is a fundamental inter-*

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* See Berke and Callahan, *Serrano v. Priest, Milestone or Millstone*, 21 J. PUBLIC LAW 23, at 69 (1972) ("the courts will once again be called upon to sit in judgment on school resource allocations in a second or third round of post-*Serrano* litigation * * *.")

est, as the Serrano court declared it to be, what flows from that?

In the criminal area, where the right to an adequate defense, has been declared a fundamental right, the Supreme Court has held that the State has to put the defendant in a position where he can actually fully exercise that right. This has been translated to mean if he is poor he must be furnished defense counsel; his trial transcript must be paid for; and he must be given other support to put him in an equal position with more well-to-do citizens.

(Senator Mondale) As I understand Dr. Coons' interpretation of the Serrano case, the court specifically was not asked to deal with the question of what he calls 'fiscal equity.' So in no way does that deal with the need question. But there have been two cases, in Virginia and Illinois which sought to deal with the fair ness principle, the need principle and both were lost.

(Mrs. Carey) I am getting at it from a different way. The Serrano decision did declare education to be a fundamental interest, and it said, as a result of that, we have to do certain things with the way we spend money for education, but *there are a whole lot of things in different directions that flow from the finding of fundamental interest.*

In other lawsuits which raise the point directly — which this case didn't — *it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest,* the same way a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids.

(Senator Mondale) I understood Dr. Coons to say he hopes no one will bring a lawsuit of that kind now.

Did I understand you correctly?

(Dr. Coons) Yes, sir.

(Mrs. Carey) Dr. Coons does not want to have Serrano fouled up on its way to the Supreme Court.

(Senator Mondale) That is going to be quite a conference in October.

(Mrs. Carey) *Ultimately, 5 or 10 years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas.*"

(Senate Select Committee on Equal Educational Opportunity, 90th Congress, 2nd Session. *Hearings* at pg. 6868 (hereinafter cited as Mondale Committee Hearings) (emphasis added).

It is evident that admitting a judicial role in this sphere will result in the crippling of essential governmental programs by a welter of conflicting legal commands. The existing system of multilevel grants in aid in many of its aspects makes effective budgeting difficult. When these difficulties are compounded by a number of conflicting decrees by state and federal courts, hasty and emotional legislative responses, and all the other predictable consequences of the course being urged upon the court, it is by no means clear that the intended beneficiaries of the new rules will in fact benefit from them, or will benefit from them more rapidly than they would benefit from a process of public persuasion directed at the legislature. The recent experience in connection with welfare litigation in California, with its barrage of conflicting federal and state injunctions, special sessions of the legislature, fund shortages and executive cutbacks may supply a vivid illustration of what is in store for our educational system under the regime urged upon the Court here. The consequences for school bond issues are also notorious. As noted by the court in *Spano v. Board of Education,* 328 N.Y.S.2d 229 (Sup. Ct., Westchester County, January 17, 1972):

> "Many contemplated school construction projects it was urged are in jeopardy as a result of the refusal of municipal bonding attorneys to render the necessary certification as to no pending litigation which would impair the validity of the bond issue . . . Unless and

> until the United States Supreme Court reverses or modifies McInnis and Burruss, I see no legal virtue championed or laudable judicial purpose served by placing the sword of Damocles over school bond financing in this state for the next several years."

Furthermore, there is no stopping place in plaintiffs' egalitarian logic which will be consistent with the survival of the right to private education. Indeed, as even commentators sympathetic to their cause have indicated, there is little stopping place in the logic as distinct from Plaintiffs' intentions short of compulsory state operated boarding schools. See Kirp, *The Poor, The Schools and Equal Protection*, in Harvard Educational Review, *Equal Educational Opportunity* (1969), at 155-56. The principle that education should not be a function of parental wealth, articulated by the *Rodriguez* decision and in the very title of the Coons, Clune and Sugarman book, is a politically debatable one on numerous grounds. It appears flatly inconsistent with the thrust of *Pierce v. Society of Sisters*. It would constitute constitutional compulsion of an "organic relationship of the citizen to the state" within the meaning of Justice Holmes' dissenting opinion in *Lochner v. New York*. But the maxim that "the child is not the creature of the state" evokes little sympathy from plaintiffs and their allies, some of whom have already declared their purpose to utilize the *Serrano* principle as a springboard further to constrict private schools and the right to private education: Thus Dr. Coons:

> "(Senator Mondale) In the absence of some kind of adjustment in the rich district, would you not actually be encouraging private schools for the rich? Would they not say, 'Well, we are in this trap where we can raise a lot of money to be sent elsewhere or we can put downward pressure on revenue for our local schools and simply spread all of our money on private schools

for our children.' Since all the capital costs of constructing private schools is deductible from the taxes anyway, it is sort of publicly supported . . .

(Dr. Coons) May I answer that other question which you had about the rich district and its disincentives? It is an important question. * * *

I think the amount that would already be taken out in personal income and other statewide taxes for the general support of education would be enough so that most people would not be able to afford both the support of public education and private education. At least there would not be a sufficient number of such people that there would be any but a fringe of districts in which the demography would be such that there would be so many very rich people that they would opt out of public education altogether. *And, of course, it is up to the State as to whether they can do that.* The State, after all, would set some kind of adequate minimum which every child should have available in public education. A district could simply drop out, as it were; it would have to stay in the system. Being in and paying for that system, people are going to use it — they are going to have to carry the burden of that local system, and so, there is a powerful incentive to stay in it and make it all work as a public system.

Was I responsive?

(Senator Mondale) Yes."

(Mondale Committee Hearings, pp. 6883-84) (emphasis added).

Mrs. Carey, the Assistant Director of the Lawyers' Committee sponsoring this litigation, went even further in outlining the possible attack on private schools:

"(Mrs. Carey) On the private school issue, that is one that everyone kicks around. As a factual matter, I am not sure there's any difference right now between the Scarsdale school system and Scarsdale with a private school system. It is just the admission practices that are slightly different. At present, it is a

question of buying a house rather than getting into a school. So, I am not sure that will change things from the way they are at present.

Another thing to consider is whether, if private schools are actually set up as nonprofit corporations and so on, whether there would not be grounds for attacking them. There is a case, a Lawyers' Committee case in Mississippi, *Green v. Kennedy*, where white parents tried to set up a school, a private school, for the purpose of avoiding integration, and the court knocked down their tax exemption on the ground that it was a deliberate evasion of the constitutional mandate.

Now, if the Constitution declares education to be a fundamental interest, it might be that you could attack private schools on that ground.

(Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.

(Mrs. Carey) That is right.

(Senator Mondale) *You might say there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law.*

Go ahead.

(Mrs. Carey) *That is roughly what I wanted to say."*

(Mondale Committee Hearings, pg. 6884) (emphasis added).

What plaintiffs seek to have the judiciary set aside is the operation in the sphere of education of the system of allocation of resources that in greater measure or less determines the distribution of every other commodity — this in a nation whose constitution, including the Fourteenth Amendment to it, expressly recognizes and protects private property: "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative not a judicial function. Nor should we forget that the Constitution ex-

pressly protects against confiscation of private property or the income therefrom." *Lindsey v. Normet*, 405 U.S. 56, 74 (Feb. 22, 1972). The plaintiffs totally fail to respond to the problem created for them by the continuing survival of the "state action" doctrine, see *Evans v. Abney*, 396 U.S. 435 (1970); *Adickes v. Kress and Company*, 398 U.S. 144, 167 note 39 (1970). The state is not constitutionally obligated to eliminate the effects of differences in private means of individuals, let alone differences in average private means of the subdivisions in which individuals reside. These propositions would seem self-evident, but they are not in the constitutional wonderland inhabited by plaintiffs. As Dr. Harley Lutz, Professor of Public Finance at Princeton, has recently written:

> "It comes as quite a shock to be told that the property tax, workhorse of the tax system, is unconstitutional after so many years of reliable service. One can't help being suspicious of the circumstances — all the court decisions, in several states, have involved only school financing. The 'rich' and 'poor' municipal units must levy different rates of property tax for the support of all other local functions, but apparently the disparities of tax rates for these purposes are still constitutional; moreover, every state provides more or less state aid to local schools. Without consideration of this fact, complaint about differences in property values and tax burdens is overdone. * * * Mother Nature is primarily responsible for the differences in real property values, and the contrivances of men have been aimed at manipulating municipal boundaries for maximum advantages. Topography, location and other natural features result in value differences that cannot be eliminated. A given millage levy will obviously produce more revenue for a governmental unit that contains high value property than it will for a unit that contains low value property. It would be as reasonable to hold that the Rocky Mountains are unconstitutional because they are not flat

> enough to plow as is to indict the property tax because a given rate of tax will not produce the same revenue in every district. * * * We may not have to wait long before some court will decide that a low income family is denied equal protection of the law because it can buy less than another family with more income. Inequality of personal income would then be unconstitutional." Lutz, *Can the Property Tax be Replaced?*, Wall Street Journal, February 9, 1972, page 14.

There is no reason to believe that the *Rodriguez* principle can be readily confined to educational expenditures or readily enforced. Already defendants have been informed that one "wealthy"* school district in a university community in a mid-western state where a *Rodriguez* suit has been filed has commenced guarding itself against an unfavorable decision by transferring various physical education, shop, and audiovisual activities from the school board to the park board and library board. Of course, following transfer, they may not be within the scope of the compulsory education laws and hence arguably not within the scope of *Rodriguez*, notwithstanding that their noncompulsory character may mean that they will be availed of by fewer students from poorer homes. It is more probable, however, that if *Rodriguez* is accepted, the courts will feel bound, as they properly have in the school segregation cases, to pursue methods of evasion and to proliferate the *Rodriguez* principle to the point at which a corps of suitors** (or marshals) will relentlessly

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* Plaintiffs' definition of "wealth" in relation to education means the possession by a taxpayer of an annual sum equal to approximately one-sixth the cost of a late model car, the use of which upon one's childrens' education is an offense which must relentlessly be pursued and prevented by the federal equity power.

** There will be more cases like *Jelliffe v. Berdon* (U.S. D.C. Conn. Civil No. 14,821) where a federal district court on May 15, 1972 denied a preliminary injunction to prevent the Town of Darien from

root out from local property-tax-supported budgets all activities which raise the danger that someone might be educated by them. Do the federal courts really wish this role? Do they regard it as consistent with the maintenance of local or private initiative in a free country?

There is no reason to think that the judiciary, and particularly the lower federal and state judiciary, will possess any significant competence in this sphere. Typically and regrettably, constitutional cases raising important public issues are briefed on close schedules by lawyers heretofore possessing limited familiarity with the subject matter. This is not self-evidently the best means of making available to a deciding tribunal pertinent information. Rather it is a method of making public policy that places a premium on sloganeering — sloganeering of the sort that captivated the California and Texas Courts. In the end, it will set in motion forces that will lead to an increasing politicalization of the judiciary. Attention may properly be given to Justice Schaefer's recent warning:

> "It is true, I think that the style of legal argument and perhaps even the technique of legal research have shifted in recent years. This impression cannot be documented, but it seems to me that much more than in the past the lawyer's quest has become a search for quotable words which, regardless of their initial context, can be read in the abstract to bear upon the situation at hand. The pressure is thus toward a jurisprudence of words or phrases divorced from facts and capable of generating new words and phrases with independent lives." Schaefer, Book Review, 84 Harv. L. Rev. 1558, at 1559 (1971).

The present case constitutes a repudiation of methods of persuasion in favor of recourse to authoritarian decrees

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erecting a public school in asserted violation of the *Serrano* principle. Cf. also *Ansell v. Howard County Council*, 264 Md. 629 (March 6, 1972).

whose sanction must rest if disputed, entirely on force. No processes of consent gave rise to the Texas decision. The judgment of no legislative body or constitutional convention supports its result. If the decrees of courts rendering such judgments are disputed, the courts will stand effectively alone. Indeed, the present case is brought against a background of years of almost complete public and political inactivity by the proponents of greater educational equalization. The columns of the largest newspapers of most states will be searched in vain for any significant effort during the last several sessions of their legislatures by the proponents of the present lawsuits to enlist public support of greater equalization. Although it may be true that the narrow felt interests of taxpayers in the wealthier subdivisions is not aided by equalization, almost all social progress is the product of enlightened self-interest or what Justice Holmes described as the limitations upon self-interest imposed by sympathy. Were this not the case, there would be no equalization programs at all, and, indeed, no public schools at all. But the designers of plaintiffs' theory elect to abjure public persuasion. Rather here the tyranny of the syllogism is resorted to in order to carry the day on the belief that it is easier to persuade one man, or five, than to persuade thousands.*

DESTRUCTION OF THE FISCAL POWERS OF AMERICAN LEGISLATURES

The proposition tendered by plaintiffs is of course totally at variance with numerous prior cases including those cited in the *McInnis* opinion as well as those cited in *Board of Education of Independent School District of Muskogee v. Oklahoma*, 409 F.2d 665 (10th Cir. 1969). The *Muskogee*

* Indeed the Coons, Clune and Sugarman book, is not dedicated, in the manner of most polemical treatises, to a hopefully enlightened public but rather "To Nine Old Friends of the Children."

case makes clear that "the use of taxes in the county where the tax property is located does not, of itself, constitute an invidious discrimination or unreasonable classification." The *Muskogee* case refers to the leading Supreme Court cases relating to constitutional limits on state taxation. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959), the Supreme Court, rejecting equal protection challenges to state taxing systems, observed that states "have the attributes of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." The cases are legion which reject any suggestion that there is a constitutional requirement of correlation between taxes and benefits, a constitutional prohibition against regressive taxation (such as the property tax, the sales tax, the value-added tax, or the total impact of state and local taxation generally), or a constitutional prohibition against regressive benefit programs. (Public colleges, national parks, mortgage interest tax deductions, etc); yet an opposite postulate as to all three of these issues is at the root of Plaintiffs' complaint here.

The decided cases clearly indicate that there are virtually no constitutional limits on the distribution of state benefits by legislation. In *American Commuters Association v. Levitt*, 279 F. Supp. 40, 47 (S.D. N.Y. 1967), the court observed:

> "With respect to the challenged statutes conferring benefits, plaintiffs claim these statutes are unconstitutional because there is no equivalence between the taxes plaintiffs pay and the benefits they receive. This claim does not present a substantial constitutional question warranting consideration by a three judge court. * * * The controlling question as stated by the Supreme Court with respect to the constitutionality of a tax is whether the taxing authority has given anything for which it can ask a return. *State of Wisconsin*

v. J. C. Penney Company, 311 U.S. 435 (1940). * * * Given the power to tax, the challenged statutes conferring benefits are not unconstitutional even if, as plaintiffs allege, the benefits they receive are not equivalent to the taxes they pay. Cf. *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495, 521-25 (1937). As the court stated in *Morton Salt Co. v. City of South Hutchinson*, 177 F.2d 889, 892 (10th Cir. 1949):

> 'When * * * (a) tax is levied upon all the property for public use, such as schools, the support of the poor, for police and fire protection, for health and sanitation, for water works and the like, the tax need not, and in fact seldom does, bear a just relationship to the benefits received. Thus, the property of a corporation may be taxed for the support of public schools, asylums, hospitals, and innumerable public purposes, although it is impossible for it to derive any benefits other than privileges which come from living in an organized community.'"

The principles invoked by the district court were emphatically affirmed by the Court of Appeals in *American Commuters Association v. Levitt*, 405 F.2d 1148 (2d Cir. 1969). In that case the Second Circuit made mention of the "special attention courts have always shown to tax matters even when constitutional rights are involved, *e.g.*, *Nelson v. City of New York*, 352 U.S. 103 (1956)."

If plaintiffs attain their apparent desire, a fully-state-funded system, the lot of the state administrators will not be a happy one. For the sponsors of the plaintiffs' suit have already made it clear that they consider that its principles extend beyond barring "discriminations" on the basis of district wealth and operate to bar discriminations in educational spending programs on any arbitrary basis, that is to say, any pattern of expenditure not resulting in per pupil equality. Thus Professor Coons has observed:

"(Senator Mondale) So that if a school district found gold in the downtown area that permitted it to generate an additional $500 in the same tax effort for their school children, that would come within the *Serrano* decision; but, if they had an influential Congressman that distributed the gold out of the Federal Treasury, does it apply?

(Dr. Coons) I am not sure. It seems to me that the 'due process' clause of the Fifth Amendment might require a level of rationality in Federal spending which would make such a policy questionable. It would be a very interesting constitutional problem."* (Mondale Committee Hearings, pg. 6848).

What became of most federal public works programs on this theory, so inconsistent with our history and with generally understood limitations on the judicial function, is not explained by plaintiffs. For them, it is not sufficient that, as here, an elected representative legislature has apportioned burdens and expenditures; the courts are to be invited to second-guess budgetary determinations and to invalidate "regressive" taxes and expenditures and "unfair" relationships of tax and expenditure as they did in *Rodriguez*.

The thesis of *Rodriguez* is that some unconstitutional unfairness inheres in the fact that the residents of "rich" districts are taxed less heavily, for more educational benefits, than the residents of "poor" districts. But the case law is emphatic that the constitution imposes no requirement of a relationship between tax burdens and benefits. As

* Indeed, plaintiffs are driven inexorably to this conclusion. The specious nature of the distinction which they would draw between *Serrano* and *McInnis* may be appreciated by considering their probable attitude toward a statute providing for full state funding and going on to recite that the educational needs of the state required appropriating to the separate subdivisions in the precise unequal amounts spent under the total present system.

stated by Mr. Justice Cardozo for the Supreme Court in *Carmichael v. Southern Coal Co.*, 301 U.S. 495:

> "We have recently stated the applicable doctrine. 'But if the tax, qua tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasurer, neither is made invalid by being bound to the other in the same act of legislation.' *Cincinnati Soap Co. v. United States*, 301 U.S. 308, ante, 112, 57 S. Ct. 764, *supra*. Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
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> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, ante, 112, 57 S. Ct. 764, *supra*. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas v. Gay*, 169 U.S. 264, 290, 42 L. ed. 740, 746, 18 S. Ct. 340. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. *Cincinnati Soap Co. v. United States, supra; Carley & Hamilton v. Snook, supra* (281 U.S. 72, 74

L. ed. 708, 50 S. Ct. 294, 68 A.L.R. 194); *Nashville, C. & St. L.R. Co. v. Wallace*, 288 U.S. 249, 268, 77 L. ed. 730, 738, 53 S. Ct. 345, 87 A.L.R. 1191. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 203, 50 L. ed. 150, 153, 26 S. Ct. 36, 4 Ann. Cas. 493 (301 U.S. at 522, 523)."

Justice Cardozo further pointed out, citing numerous illustrations:

> "Cigarette and tobacco taxes are earmarked, in some states, for school funds and education purposes * * * Chain store taxes are sometimes earmarked for school funds * * * license and pari-mutuel taxes in states authorizing horse racing are directed to fairs and agricultural purposes, to highway funds, and to an old age pension fund in Washington * * * Unemployment relief, though financed in most states by special bond issues, has in some instances been financed by gasoline taxes * * * Similarly, special taxing districts for the maintenance of roads or public improvements within the district have been sustained, without proof of the nature or amount of special benefits (citing cases) 301 U.S. at 522-23 nn. 14, 15."

The havoc that will be wrought by the acceptance of the principles espoused by plaintiffs and the *Serrano* court is quite clear. The effect of acceptance of their claim would be to project the judiciary into a "second guessing" of government fiscal determinations unparalleled in our history. Virtually all existing spending programs, for education and otherwise, will be opened to attack.

Thus, the Federal Impacted Aid Program will be open to constitutional attack by the principle announced by plaintiffs, who reject the rational basis test presently used to sustain the program. See *Okaloosa Co. School Board v. Richardson*, (N.D. Fla., Oct. 12, 1971).* Indeed, the

* 40 L.W. 2238 (N.D. Fla., Oct. 12, 1971).

program is a major cause of the "inequalities" between school districts in many states. Dr. Coons himself has discussed the possibility of such an attack. "It seems to me that the due process clause of the Fifth Amendment might require a level of rationality in Federal spending which would make such a policy questionable. I would be delighted to be involved in that law suit." (Mondale Committee Hearings pg. 6848). Even the Federal Title I Program, which uses negative wealth measures, may not be immune. See Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111, at 121 note 56 (1972).

UNDESIRABLE EFFECTS ON THE TAX SYSTEM

One consequence of the *Rodriguez* rule may be to promote a shift away from property taxation toward other forms of taxation whether of a regressive or progressive character. The property tax is an unfashionable tax, but the reasons for its unpopularity are not necessarily to its discredit. "The property tax's high visibility is sometimes cited as if it were an objectionable feature. But this is a curious argument. Taxes ought to be visible, not concealed * * * what's more, although some homeowners seem not to connect clearly the property taxes they pay with the services those taxes finance, there is a much closer linkage between costs and benefits than at the state or federal level." Cordtz, *A Word for the Property Tax*, Fortune, May 1972 pp. 105-06.

A shift away from the property tax would have other consequences. One of them would be to confer a windfall upon industries effectively exempt for one reason or another from corporate income taxation:

> "One aspect of the local property tax, which is sometimes overlooked, is that it can, in effect, close up the loopholes in the federal income tax laws. Con-

sider coal. Coal royalties are accorded both capital gains treatment and depletion allowances. As a result of those two loopholes they are taxed on the federal level at a very very minimal level. Thus, the local property taxes is really the only tax in existence now which at least has the potential for getting at the fantastic mineral wealth." (Mondale Committee Hearings pg. 6775) (Testimony of Ralph Nader).

In addition, most economists are agreed that the imputed annual value of owner occupied land is at least conceptually income though not taxed as such under federal and state income tax laws nor otherwise reached except by property taxation. See Marsh, *The Taxation of Imputed Income*. 58 Pol. Sci. Q. 514 (1943); Vickery, *Agenda for Progressive Taxation*, 18-26, 44-49 (1947); Simons, *Personal Income Taxation* Ch. V (1938). "The British income tax and those of some other countries, include the rental value of owner-occupied homes in taxable income." Surrey and Warren, *Federal Income Taxation* 129 (1960 edition).

Still other economists point out virtues of the property tax in promoting transferability of land:

> "Not only are the property tax's purported flaws exaggerated, but its virtues are too often slighted. Properly applied, it can help a free real estate market function in a way that maximizes the benefits to society. Economists generally agree that low property taxes encourage speculators to hold land off the market for appreciation, since the cost of holding the land is insignificant compared with the potential gains. There is evidence that this has already happened in the U.S. on an important scale. Between 1956 and 1966 according to studies made by Alan D. Manvel for the National Commission on Urban Problems, land prices almost doubled — rising from 270 billion to 520 billion. The rate of increase was almost 7 times that of the wholesale commodity price index. Yet the rise in the value

> of land was caused almost entirely by the growth in the economy (which increased the demand for an inelastic supply) and by society's investment in infrastructure and services. Realistic property taxation would compel the owners of undeveloped and underdeveloped property to pay a fair share of the costs of services from which their lands derived additional value. Large scale reductions in property taxes on the other hand would merely strengthen the forces that already tend to inflate land prices. The fantastic price of land in many European countries, where property taxation is minimal, shows the potential danger." Cordtz, *supra* at 106.

These virtues of the property tax are not to be lightly despised. Certainly the decisions as to the value and fairness or lack of it of the property tax are decisions properly committed to state and local legislatures. Yet the present litigation constitutes a massive assault upon the property tax as it presently exists in the United States. The practical effect of adoption of the *Rodriguez* rule may be to require the states either to abandon the property tax for education or to provide for its state collection and assessment, an administrative task of gigantic proportions and one scarcely practicable in the near future in the many states which do not have state assessment agencies or state property taxes. The proponents of these suits do not deny these consequences, they acknowledge and seek to foster them:

> "The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed." (Mondale Committee Hearings at 6867) (Testimony of Sarah Carey).

There is no reason why the property tax should be required to be a state tax or why the taxing authority should

be required in the absence of a state property tax to coordinate assessments by thousands rather than merely dozens of assessors. It is not surprising that the reaction of academic students of public finance to the recent court cases has been something less than enthusiastic.

Moreover, in many states, shifts in the pattern of taxation away from property taxes will operate to the detriment of poorer families. Particularly is this so in those states which already have adopted high income taxes, such as Maryland, Wisconsin and New York, to give three examples. By reason of the competition for industry these states are effectively precluded from significantly further increasing their income taxes in the absence of corresponding increases by neighboring states. They will be driven either to resort to state property taxes or to resort to state sales taxes which most economists agree are more regressive than the property tax. Some indication of the choices which various states are likely to make if presented with the need for raising a large quantity of additional revenues for state funding of education may be gleaned from examination of the tables at pages 307-08 and 317-18 in Johns (editor), *Economic Factors Affecting the Financing of Education*, National Educational Finance Project Volume II. These tables reveal that as of their dates, Wisconsin, by adopting the normal 5% sales tax rate and including consumer services at that rate, might derive an additional $88 million in sales tax revenues whereas that state could gain nothing from adoption of the high Oregon income tax rates since it already has a high income tax. The State of New York would have gained $1,150,000,000 from the 5% sales tax including consumer services, while it would have gained only $98 million from raising its income tax to the Oregon rates. The State of Maryland would have gained $165 million from raising its sales tax

rates to 5% and including consumer services, it would have gained only $54 million from raising its income tax to the Oregon levels. Given the practical exhaustion of these states' income tax bases it is not difficult to discern the direction in which they will turn if required to raise vast additional state sums for purpose of compliance with a *Serrano-Rodriguez* rule.

This potential regressive effect, of course, is not confined to the state level, as critics of proposals for value added taxes remind us. See Moynihan "Can Courts and Money Do It?" New York Times, January 10, 1972, page 24 E "Who will provide this money is not clear: it could come from heavier taxes on the poor and the working class."; Kraft, "U.S. Is Taxing Itself Too Little and Wrongly" Baltimore Sun, January 24, 1972, page 11 A ("In the name of a handful of persons badly hurt by property taxes — particularly older people who could easily be helped in some other way — [the President] holds out for next year the promise of substituting for state property tax a general sales tax.")

It is clear from the authorities discussed that there is no assurance that either on the tax side or the benefit side a shift to a formula complying with *Rodriguez* will be of benefit to poor taxpayers or their children. In many jurisdictions, and perhaps in the nation as a whole, the result may be a shift to more regressive sales taxes in the place of the present reliance upon property taxation. Similarly, distribution of school expenditures on a basis which gives property-rich areas less money may in many states operate to the detriment of persons of low income who reside in disproportionate measure in just such built-up property-rich areas. The assumption that shifts away from the property tax or shifts in expenditures away from property rich areas will have progressive effects has been

vigorously disputed and the writers on public finance have been quick to point out that:

> "Any reduction in [property] tax rates would confer windfalls according to ownership — and property ownership is more concentrated than that of income. Who actually bears the burden of property taxation? Neither the theoretical analysis nor the empirical evidence is as clear as we should like. A part of the tax on commercial, utility, industrial and housing structures can be assumed to fall on consumers more or less in proportion to spending. This part then has some of the regressive element which is often cited in condemning the tax. But despite frequent implied assertions to the contrary, a part probably remains on suppliers of capital; this will be more progressive than proportional (and not regressive). The considerable portion which falls on land, much of which was capitalized in the past, is hard to place in a meaningful sense — except to say that past and present land owners are generally 'not poor'. The distribution of this burden will be decidedly more progressive than regressive. In short, although families with 'low' incomes or consumption do bear property tax, persons who own, directly and indirectly, 'large' amounts of property must carry burdens which are 'heavy'. G. Lowell Harriss [Professor of Economics at Columbia University]. *Issues and Interpretations*, 155 The Bankers Magazine No. 2 (1972).

EFFECTIVE COMPULSION OF FULL STATE FUNDING

The *Rodriguez* decision at bottom is an effort to constitutionally impose a regime of full state funding of education upon the 49 American states that have historically rejected such a system and upon the state of Hawaii in which increasing dissatisfaction with its results has been manifested in recent years. It is true that for the moment proponents of the *Rodriguez* rule have urged that there are other methods of educational finance than full state

funding, such as voucher systems and the Coons proposal of "power equalizing", which are consistent with the *Rodriguez* rule. See, *e.g.*, Lawyers' Committee for Civil Rights, *Valid Systems under Serrano v. Priest, Compact*, vol. 6, no. 2 (April 1972) at 38. That these alleged alternatives to full state funding are "good for this day and train only" emerges quite clearly however from the writings of proponents of the new "movement". Thus, in describing the possible use of voucher plans, even the Lawyers' Committee suggests that "the system * * * be limited to an experiment in two or three urban areas" or be likewise limited to "after school educational experiences — *e.g.*, music or art lessons." *Id.* at 41. It requires only a slight familiarity with the general view of state education authorities with respect to voucher plans to realize that they are scarcely a likely result of court imposed adoption of a *Rodriguez* rule. Thus, for example, the National Educational Finance Project in its extended volume on "Alternative Programs for Financing Education" (National Education Financing Project No. 5) dismisses the possible use of voucher plans in one footnote:

> "This so-called 'voucher plan' was not considered because its constitutionality is in doubt at this writing. Furthermore, if the law prohibited the redeeming of the vouchers by parochial schools and also by private schools which enrolled a lower percent of blacks than the percent of blacks enrolled in public schools of the district in which the private school was located, there would probably be few advocates of the voucher plan." *Id.* at 350 note 3.

The so-called power-equalizing option pursuant to which districts would be permitted to supplement the uniform state allocation by levying additional local taxes provided that the wealthier districts levying such taxes turned over a large portion of the proceeds for statewide use similarly

is not regarded as a viable alternative to full state funding by anyone. Even its chief and only sponsor, Professor Coons, has indicated that it is designed for consumption only by judges and not by educators or legislators:

> "Of course, there are certain problems inherent in that [power equalizing proposal], not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000 it may raise $1,500. It is cosmetically bad politically." (*Mondale Committee Hearings*, page 6882.)

In the event that any state should be so foolhardy and intrepid after adoption of the *Rodriguez* rule as to adopt a power-equalizing rule as distinct from full state funding, the proponents of judicial intervention in these matters have already made clear what is in store for it. Thus, Professor Wise, the founder of the new cult, reads the California decision as prohibiting not merely existing systems of school finance but the Coons power-equalizing proposal also:

> "This analysis is consistent with the more equalitarian proposition that the quality of a child's education may not be a function of local wealth or how highly its neighbors value education. In other words, it would prohibit variations in the number of dollars spent on any child by virtue of his place of residence. * * * One point that remains unclear in the opinion is whether the equal protection clause applies to children or to school districts. If it is children who are entitled to equal protection, then the quality of a child's education could not be subject to a vote of his neighbors * * *." Wise, *The California Doctrine*, Saturday Review, November 20, 1971, 78 at 82.

Professor Karst has analyzed the California decision as in effect rejecting the power equalizing option, pointing

out that Professor Coons had unsuccessfully sought a modification of the decision to expressly allow it. Karst, *Serrano v. Priest*, 60 CALIF. L. REV. 720, at 740, note 87 (1972).

Professor Michelman likewise has assisted in sharpening the blades of the knives which will fall upon any state utilizing this supposed option, urging that the Coons approach involves unacceptable variations between children and districts and that any other approach allowing limited local variations presents problems of justiciability. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harvard Law Review 7 at 54-59. He is candid in favoring "insistence on channelling all the state's educational expenditures into the common pool." *Id.* at 58.

The President's Commission on School Finance has contributed its denunciation of power equalizing on the grounds that "it would be extremely difficult to establish an upper limit on district tax rates that would enable the state to plan its educational fund requirements. While the power equalizing would eliminate disparities based on wealth, it would nevertheless continue vast differences in funding among school districts and therefore among children in the state." President's Commission on School Finance, *Schools, People and Money* (1972) at 33.* The authors of the report of the Fleischmann Commission in New York State likewise rejected power equalizing.

> "We prefer full state funding to district power equalizing for several reasons. First, assume that wealthy districts are inhabited by wealthy residents and poor districts are populated by the poor. All district power equalizing does then is to assure equity in

* See also Berke and Callahan, *Serrano v. Priest, Milestone or Millstone*, 21 J. PUBLIC LAW 23, at 62 (1972), criticizing power equalizing as unfair to urban areas.

tax rates vis-à-vis school expenditures. Poor people would have difficulty in meeting the competition of rich people in rich districts, once the latter saw how the finance plan was shaping up and raised their school tax rates to preserve their favored position.

Second, assume (as we do) that there is no absolute standard of education which can be described as 'adequate' — that all educational disparities are relative. Then, if one is going to embark on a major revision of educational finance arrangements, why should one not remove 'place' inequalities as well as wealth inequalities? The quality of a child's education should, in our view, be no more a function of how highly his neighbors value education than how wealthy they are.

Moreover, we believe that the equal protection clause of the 14th Amendment applies to individual children rather than school districts. If this is so, then the quality of a child's education cannot depend any more on the vote of his neighbors within the confines of a local school district than it can on their aggregate relative wealth vis-à-vis other school districts within the state. The California Supreme Court in *Serrano v. Priest* was not explicit on this point, but it did take some pains to argue that territorial uniformity in school finance is constitutionally required. 'Where fundamental rights or suspect classifications are at stake,' the Court said, 'a state's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause.'

To make the point clear, consider two districts, A and B, and let them be of equal wealth. Suppose the residents of district A choose a school program half as costly as the residents of district B. Is it good policy for the state to require the children of A to suffer the lifetime handicap of inferior education, which is to say, should the state exclude these children from the benefits of district B education on the basis of a district boundary line that is itself a historical accident? As we understand the ideals of a democracy, public

institutions — and especially the schools — should see to it that personal attributes such as aptitude, talent, and energy, play a progressively larger role in an individual's success and development, while parental wealth, on the one hand, and apathy on the other, play a progressively smaller role. We see no way for this ideal to be achieved in the absence of direct state intervention in the allocation of educational resources.

One of the functions of an educational system is to act as a sorting device. Classification of people on grounds of ability and aptitude occurs all the time, and schools often act as a major transmitter of the process. But if primary schooling of some children is of vastly greater quality than that of other children, the sorting process is ineffective and dangerous. Local tastes for basic educational services should not distort the function of the sorting mechanism and possibly undermine students' potential and achievements." (*Report of the New York State Commission on Quality, Costs, and Financing of Elementary and Secondary Education* at 2.45 and 2.46.

Lest the critics of power equalizing have overlooked some of the considerations which would be urged against it in future litigation, Professor Coons himself has supplied some further suggestions:

"The first group notes that tax-sensitive voters may tend to cluster (*e.g.*, older persons with fixed incomes and no children). These critics would prefer the security of a state mandated uniformity of spending which, as they view it, would be more education-oriented and less arbitrary. * * * The second group of critics raises a more technical objection to local choice. They doubt whether it is possible to establish fiscal neutrality or know when it exists. Realistically there are many subtle forms of 'wealth' difference in addition to differences in the value of taxable property per pupil; to equalize assessed valuation per pupil does not necessarily equalize fiscal capacity. If in a decen-

tralized ('power equalized') district system differences in spending exist, and if, for example, spending is higher in districts with higher personal incomes, how would an objective observer determine whether taste, wealth, or some other factor is responsible?" Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action, 111 at 117 (1971).

These quotations should be sufficient to make clear that what is at issue in this case is whether this court is going to impose upon the states full state funding as a matter of constitutional compulsion. Notwithstanding the protestations about the alleged availability of voucher systems and power equalizing, a decision by this court affirming *Rodriguez* will clearly have the practical effect of imposing full state funding upon every American state. The alleged options remaining open to the states are not viable and are not intended to be so.

Against this background the appropriate disposition of this case is apparent in light of what all nine members of this court have recently stated in respect to the importance of local control of school systems:

> "A more weighty consideration put forth by Emporia is its lack of formal control over the school system under the terms of its contract with the county. * * * Direct control over decisions vitally affecting the education of one child is a need that is strongly felt in our society. * * *" *Wright v. Council of City of Emporia*, 40 L.W. 4807, 4812 (Opinion of Stewart, Douglas, Brennan, White and Marshall, J.J.).
>
> "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Wright v. Council of City of Emporia*, 40 L.W. at 4815 (Opinion of Burger, Blackmun, Powell and Rehnquist, J.J.).

Indeed, it is clear that the major objective of many of the proponents of the present litigation is the obliteration of local control. See, *e.g.*, Zukotsky, *Taxes and Schools*, The New Republic, June 17, 1972, pp. 20, 21, where it is observed:

> "One cannot reform school financing in ways that meet the tests courts have adopted without striking directly at the problem the integration cases approach obliquely; the power of local school boards to make decisions that influence what takes place in classroom and school. The power of local boards to determine what children go to which school, what teachers are hired, where they teach and how much they are paid, where schools are built and buses run are facets of district power; so is the power of boards to tax, incur debt, make budgets for distributing local and state revenues, contract for personnel and services. Integrationists are attacking the district from the front as a fortress of power and privilege, and fiscal reformers from the rear, but both are headed for the same strong room."

IMPAIRMENT OF LOCAL CONTROL

There are profound implications for the control of the public schools in the results sought. The need to secure citizens' support for local schools in order to secure support for local property tax increases will be eliminated. The need for involvement of school superintendents in the politics of the community and the desires of its citizens will be in large measure eliminated. The power of the purse of the local legislative body will be eliminated.* The implications for control of the school system and of the curriculum are recognized by virtually all the commentators on this subject. The most obvious and immedi-

* This is graphically illustrated by the supremacy given determinations by the Maryland State Board of Public Works in the recent legislation providing for full but not pre-emptive state assumption of school construction costs in that state. Md. Code, Art. 77, § 130 A (g).

ate shift is a shift in the responsibility for labor negotiations with teachers' unions, which will naturally be directed at the level of government which provides the revenue — the state government under the mode of educational finance favored by plaintiffs. There are longer term shifts also. Acceptance of the principle contended for presages a shift in control from the district and county to the state and perhaps ultimately to the nation. The extent to which such a shift is desirable and the degree to which it is desirable raise questions of the highest political moment, which under a democratic system of government cannot be placed beyond legislative and popular control. The implications have been spelled out by Professor James Coleman:

> "There are two very different conceptions of the relation of schools to the social order. One conception is that of schools as agents for the transmission of knowledge, culture and social norms of and thus as agents for the maintenance of the social order. The other conception is that of schools as crucial institutions of social change. Schools have performed both of these functions in the past and will continue to do so in the future. But the relative emphasis of the two functions has been different at different times and places and what is of interest to us here is different for local authorities and national organizations including national governments. As the discussion of differential opportunity indicated, local authorities ordinarily have more interest in stability and use of the school as a means of maintaining a social order than do national governments.
>
> Thus, again on the issue of social change, national governments are more often on one side, the side of change, and local authorities are more often on the other, the side of stability. The basic interests involved have been discussed in earlier sections; but the content of these issues of change vs. stability goes beyond the questions discussed earlier. Examples will

indicate how this is so. In Hitler's Germany, in Stalin's Russia, in Mao's China and in Castro's Cuba the schools have been used extensively by national governments as instruments of change. Modern totalitarian regimes following a coup or revolution move quickly to take control of the schools, in order to indoctrinate the new generation with the ideology of the regime. This is an important device enabling such regimes to consolidate their power and break the influence of the preceding generation upon the younger one. The use of boarding schools, the development of nationalistic youth groups in the schools, the introduction of nationalistic propaganda into the curriculum, the indoctrination of teachers and the purging of teachers are methods that these regimes have used to achieve, in a single generation, radical social change. Such attempts at change meet with increasing resistance at lower levels of social organization, all the way down to the family. What is true in totalitarian regimes is true, to a lesser degree, in democratic ones: The national government is more likely to see the schools as instruments of social change than is the local government. The local-national conflicts concerning school integration in the United States illustrate this well, because the national government, pressed by organizations at the national level, attempts to use the schools to create racial integration which is absent in other aspects of life and thus to bring about a major transformation of the social structure. What is evident in this type of conflict is, in a sense, the self-preservation interests of two social units, the nation and the community." Coleman, The Struggle for Control of Education, in Bowers (Editor), *Education and Social Policy: Local Control of Education*, 64, at 77-78 (1970).

In addition to these broader consequences which may flow from increased centralization of control, there are more immediate reasons for questioning centralization. Thus, the former Commissioner of Education, Harold

Howe, though sympathetic to the California decision, in commenting upon it has written:

> "Teachers' organizations have opposed decentralization of city schools because of the potential loss in leverage in dealing with multiple education authorities over a variety of issues, and they may welcome centralization of fiscal authority at the state level for corresponding reasons . . . Finally, the California decision raises questions of diversity and control. It is an axiom of American politics that control and power follow money. As schools finance is monopolized by the state, what would states be likely to do that they are not doing now in controlling the education options of school boards? They might move to complete standardization of education, decreeing what is to be studied, for how long, and in what manner, thereby adding to the already extensive requirements for teacher certification and similar matters. While there are abuses in any system, I believe strongly that we need less, rather than more, participation by the state in the day to day affairs of the schools."

Howe, *Anatomy of a Revolution*, Saturday Review, Nov. 20, 1971, 84, 88. Thus, too, Professor James Coleman, perhaps the leading authority on these matters, is led by concern for diversity and local control to advocacy of a voucher system with public control limited to control over ethnic and social class composition of student bodies. See Coleman, Preface to Coons, et al., *supra;* Coleman, *The Struggle for Control of the Schools*, in Bowers (ed.) *Education and Social Policy: Local Control of Education* (1970); and the essay by Coleman in Harvard Education Review, *Equal Educational Opportunity* (1969).

Dr. James Conant, though a recent convert to the desirability of full state funding, pertinently observed some years ago:

> "Four generalizations are possible about the financing of our public schools. First, in every state the

funds for the support of the local system come in part from local real estate and in part from taxes levied by the state itself. Second, in no state is the amount of money now available adequate in every community of the state. Third, to find a satisfactory formula according to which state funds may flow to school districts on an equitable basis to supplement the local financial provisions has taxed the skill and ingenuity of lawyers, legislators, and economists to the very limit. Fourth, the need for a formula comes from the fact that the real estate base for local taxes has, by in large, proved totally inadequate. There probably is no one completely satisfactory scheme. For the state to take over entirely the financing of each school district would be, of course, to move far in the direction of a system of state schools. *Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that schools are in fact local schools. I have heard the opinion expressed by those who have devoted much study to the matter that something like 50% of the current expenditures should be raised through local taxes if local control is to predominate".* (Emphasis added).

Conant, *The Child, The Parent, and The State* (1959) at 26.

In discussing Federal equalization aid, Conant recognized that any large scale program of equalization assistance would result in a large and increasing measure of Federal control, an insight which applies equally at the state level. Conant observed:

"To imagine that recurring appropriations of this magnitude can be made without careful budgeting on the part of the Administration seems to me to be the equivalent of imagining completely irresponsible government. Careful budgeting will mean, in turn, a strong Executive Agency which must have access to a mass of factual information about the educational situation in every state. The agency responsible for submitting the annual estimate to the Bureau of the

> Budget and then supporting the proposals before Congress will have no easy task. Proponents of a flat grant and various equalization formulas will have to argue their cases from time to time, if not each year. The Education Committees of the House and Senate will have every reason to examine into details of curricula and school organization, much as Committees of the State legislatures now do from time to time. Certainly a new chapter in American public education will have opened. It would not be accurate to describe the resulting situation as Federal control of our public schools, but we should certainly have a powerful Federal influence added to the present influence of the central authority in each state." (Conant, *supra*, at 55-56).

The fact that increased state financing inevitably means increased state control has long been recognized by students of state-local tax structures. As early as 1931 it was noted in Hutchinson, *State-Administered Locally-Shared Taxes* (1931) that:

> "This study of state-administered locally-shared taxes indicates, however, that state administration of taxation is the first step towards state control of the functions supported by these taxes. The state is increasing its control of local functions by minimum requirements. In the case of roads it may require that the road be built to satisfy the State Highway Commission. Minimum educational standards in the way of teachers per student and the length of the school year are often prescribed. As the amount of revenue return grows larger the restrictions placed on the localities increase in number and rigor." (at page 21).

The Hutchinson study recognizes the extent to which state control usually follows state subventions. Hutchinson quotes Sidney Webb's history of grants in aid in England, Webb, *Grants in Aid: A Criticism and a Proposal* (1920) (at p. 6) (Hutchinson at 122):

"The [British] National Government in the course of the three-quarters of a century from 1832, successively 'bought' the rights of inspection, audit, supervision, initiative, criticism, and control, in respect of one local service after another and of one kind of local governing body after another, by the grant of annual subventions from the National Exchequer in aid of the local finances, and therefore, in relief of the local rate payer".

In summarizing the history of locally shared taxes Hutchinson observes:

"Usually, however, the state administered taxes replace some source of taxation taken from the locality. Further, the method lends itself to more and more state supervision, through re-apportionment of the revenue according to the state's idea of need and through the establishment of minimum standards for the function of which the money is given. It is a movement to be watched, and studied, for the number of taxes so administered and returned is increasing. The state sees the local need and is giving its assistance, but with this assistance goes interference. This particular type of state interference will be questioned by believers in home rule, for it usually involves rigid legislative interference rather than flexible administrative control." (at 131-32).

Further, because of variations in local needs, courts will not be able, absent detailed meddling in the day to day operations of school systems, to be able to enforce any rule of equality, even the simplest. Thus, former Commissioner of Education Howe has pointed out:

"Educational costs vary considerably within a state. The cost of living in upstate New York is about 10% less than in New York City, so that teachers' salaries, a major component in any system's expenses, must be higher in the city in order to be fair. Janitorial services, repair services, construction, and the like vary

> from place to place. Vocational education, because of the high cost of equipment, and the teaching of handicapped children are exceptionally expensive. Spending exactly the same amount on each child in a state, therefore, does not provide equality of services."

Howe, *supra* at 86. Any rule of equality, whether relating to per pupil expenditures, school facilities, or allocation of taxing resources, would force state school systems into a Procrustean bed.

It is, of course, not self-evident that in an age of increasingly complex problems complete educational leveling is either desirable or possible. Indeed Professor Coleman in his preface to the work by Coons has noted that the American system of local financing in education is in effect a substitute for the English and European systems:

> "The educational systems of Europe have traditionally exhibited these dual forces through dual public school systems: academically oriented set of secondary schools for an elite and a set of schools terminating early for the masses. Another outcome of these forces has been the educational system of England: The state supported schools were added in 1870 to a system of 'voluntary' or privately supported schools. Thus the family with some financial means could satisfy both its aims by supporting the state system through taxes, providing one level of education, and sending its own children to private schools, providing a higher level for them. In the United States, a dual system never developed within public education, nor has the use of private schools been widespread . . . It would appear, then, that the second of these forces, the desire of families to provide for their own children the best education they can afford, has been wholly submerged by the goal of educational opportunity for all children, or at least it has been implemented wholly through actions which achieve this latter goal. This appearance, however, is quite misleading. In the United States, another means has arisen whereby persons with finan-

cial resources can employ them to their own children's benefit without having them spread thin over everyone else's children as well. This means is place of residence together with local financing in education." Coleman, Preface to Coons, at VII-VIII.

Professor Wise and Professor Coleman recognize the profound political implications of the claim for greater constitutionally compelled equality in school financing. In writing of the Coons thesis, Professor Coleman has observed:

> "Obviously, the application of this principle to all areas of consumption would do away in effect with income differences, destroying the whole system of incentives on which every society is founded. Coleman, Preface to Coons at XIV.*

Professor Coleman goes on to note that inputs of financial resources are only one of several components of the educational experience in a school, and that a more significant component of that experience is the class background of the other students:

> "There is, of course, a broader sense of the terms 'equality of educational opportunity' which should be kept in mind; equality of all the effective resource inputs into education, not merely the financial ones. This equality can only be measured by equal effects for children of equal ability; but it clearly consists of a variety of input resources, not merely financial ones.

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* That this has wide implications is evident. Compare the viewpoint of Simons, *Economic Policy for a Free Society* (1948) at 28-29.

> "A society based on free responsible individuals or families must involve extensive rights of property. The economic responsibilities of families are an essential part of their freedom, like the inseparable moral responsibilities, are necessary to moral development. Family property in the occidental sense of the primary family, moreover, is largely the basis of preventive checks on population and of the effort to increase personal capacity from generation to generation, that is, to raise a few children hopefully and well or to sacrifice numbers to quality in family reproduction."

> The question about the state's provision of equal education opportunity becomes a difficult one: over which of these resources does the state have control, or should the state have control? Which of the resources can the state, through legal means, demand be redistributed equally? Certainly not the attentive help which some parents give their children in learning to read, nor the discipline some parents exert in enforcing the homework assignments of the school, nor the reinforcements by parents of the performance rewards given by the school. . . . In this second area of resources (the state) has been even more ineffective than in its attempt to redistribute financial resources. This second kind of educational resource, in the form of other children in a school, Coons and his colleagues do not discuss. Yet the attempt of the state to effect a redistribution focuses on the attention of the fact that financial resources are not the only ones. More fundamentally, it raises the question of just how far the state can go, and how far it should go, in redistributing educational resources to provide equal protection to the young in the form of equal educational opportunity." Coleman, Preface to Coons at XV-XVI.

In light of this, it should be entirely clear that this case at bottom involves questions not merely of educational finance but of political theory: of whether the state is to be viewed as an organic unity, and its citizens merely as components of an organic whole, a view common to most totalitarian systems and one consistent with the thesis that the state is fully responsible for all differences among its citizens, or whether rather the authority of the state is to be viewed as resting upon some form of social contract and is hence limited in its operation upon individual differences to those powers conferred and stemming from actions taken by elected constitutional conventions and legislatures.

It need scarcely be labored that the removal of fiscal controls to the state level has consequences for the survival

of local government. It has not hitherto, in this country, been thought unconstitutional for taxes raised by a given government to be spent without reduction by the sort of excise tax on educational expenditures which plaintiffs would have this court impose on "wealthy" districts. Nor, under modern concepts of government, is it unconstitutional for one level of government to delegate powers to another, even though the result of a delegation would be to produce distinctions between the actions taken by delegates which the delegating government itself would be powerless to adopt.* The whole purpose of delegation of power is to allow the delegates to do what the delegating power could not do. It does not follow from the fact that the state has arguably created its municipal corporations,** that absent racial gerrymandering of other racial discrimination it is chargeable with the consequences of their differing actions, as the plaintiffs would have it.

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* The examples are legion. The delegations to states undertaken by Congress in enacting the McCarran-Ferguson Act, the Miller-Tydings Act, the Webb-Kenyon Act, and the federal estate tax credit for state death taxes are of unassailable constitutionality, notwithstanding that Congress would almost certainly be barred by the apportionment clause from directly imposing the federal estate tax at different rates in different states or (perhaps) from specifying in a state that "fair trade" agreements were legal in Kansas and illegal in Missouri. Similarly, the conferral of home rule powers on local subdivisions has not been thought unconstitutional because the local Council of one subdivision enacted a regulatory ordinance which the local Council of an indistinguishable subdivision declined to enact, nor has it been thought that the resulting "discrimination" presents a problem of equal protection of the laws.

** In Maryland and in most Southern states where county districts are commonplace, nearly all the counties pre-existed the state, and the same is true of towns in New England. See *Liggett Co. v. Lee*, 288 U.S. 517, 581 (1933) (Cardozo, J. dissenting) and authorities there cited. The special school and taxing districts characteristic of the midwestern states were likewise only in form of state origin and in their inception bore many of the characteristics of voluntary associations. Cf. Cooley, *Constitutional Limitations* 123 (2d ed. 1871); and see *Forsyth v. Hammond*, 166 U.S. 506, 518 (1897).

It has been pointedly observed that:

"One purpose for which many Americans will make sacrifices, for which they will subject themselves to heavy taxes, is to pay for schools for their children. Will voters do as much to finance more education if there is less of a tie to their own children? Some may, some may not.

As voters are pressed for tax dollars now, some may be reluctant to shoulder heavier burdens to pay state or national taxes for schools elsewhere. Over the years, I suspect, a significant local identification (1) of prospective benefits (2) with payment obligations, can have positive results as regards taxes designed to finance better quality.

What value system leads people to sacrifice for the welfare of children? As long as scarcity bears upon Americans as it must, even those with the best of good intentions are compelled to curb the desire to be generous.

A 'foundation' level of school spending guaranteed by state finances will elicit strong support. But it will not do as much as some people wish and are able to pay for. If free to do so, some communities will exceed the general average. The country will benefit from this local freedom. The results of better schooling do extend beyond the area that pays the excess. People move. Positive 'spillovers' are no less real than the negative ones which are cited convincingly as a reason for taxing over a wide area to pay for a (rising) level of schooling for all.

Many an American in the upper middle income group is troubled by present taxes. He or she can pay still more. In many cases, more or less willingly, Americans will reduce personal consumption and saving to pay more to government. They are more likely to do so, I suggest, the more they expect their children to benefit.

Some groups supporting the court cases argue that if people in community A want to pay, say, $2 more for the education of their own children they will also

have to pay $2 more for children in other parts of the state. Does this seem fair? How would it affect incentives? Is one too unrealistic and old-fashioned to believe that effort and thrift make a difference and are not unaffected by the prospects of rewards? What would be unfortunate is a condition in which the people who can pay for better education, who must be willing to support heavier taxes, will oppose because too much of additional amounts seem likely to go to 'others'.

For the best results in financing education, a local element may need to be larger than seems consistent with the new court decisions." Harriss, *supra.*

Finally, it is important to note that the proponents of the *Rodriguez* rule do not expect it to secure the assent or even acquiescence of the public on its merits. They recognize that, given a free choice, the overwhelming majority of districts clustering near the median in wealth are likely to prefer local fiscal control to full state funding. The acquiescence of these districts and their residents in plaintiffs' designs for full state funding is sought to be secured by a process of blackmail:

> *"A primary factor will be the self-interest of the bulk of school districts that cluster near the median in wealth.* They can expect benefits from successful reform; what they can expect from unsuccessful reform is trouble. This makes them the staunch ally of the court. *What such districts do not want is a prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds, and retroactivity remain locked in a political struggle. The self-interest of these near-median-wealth districts lies in certainty, and they will be prepared to accept any reasonable legislative package that produces it."* Coons, et al., 2 Yale Review of Law and Social Action at 118.

All of this is sought to be imposed in the face of the acknowledgment, by the architects of plaintiffs' theory, that:

"Of all public functions, education in its goals and methods is least understood and most in need of local variety, experimentation, and independence." Coons, et al., 2 Yale Review of Law and Social Action at 119.

ENFORCED MEDIOCRITY AND REDUCTION OF PUBLIC SPENDING ON EDUCATION

Virtually all commentators on these problems agree that one effect of the *Rodriguez* rule would be to limit educational expenditures in the wealthier districts and to limit society's total investment in education, its reliance upon the public schools, and political support for increased educational appropriations at the state level. The nub of the matter is found in the observation of Professor Coleman (Preface to Coons, Clune and Sugarman, *Private Wealth and Public Education):*

> "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children and the desire of each family to provide the best education it can afford for its own children. Neither of these desires is to be despised; they both lead to investment by the older generation in the younger."

The experience of the two leading jurisdictions which have adopted a system of full state funding is not such as to encourage a belief that statewide uniformity and maximization of total educational effort are consistent. In May of 1971, the Advisory Commission on Inter-Governmental Relations conducted a conference on state financing of public schools. At that conference, it was addressed by Professor P. J. H. Malmberg of the University of New Brunswick who served as director of curriculum and research in the provincial Department of Education from 1962 to 1969, during the period of the implementa-

tion of provincial assumption of all school costs. Portions of his remarks have been summarized as follows:

> "School districts which acted as innovators in curriculum prior to 1967 now are not able to do so. These districts usually spent a greater per-pupil amount on instructional development than other districts. Instructional funds are now distributed by the province on the same per-pupil basis to all school districts and they, plus economies, are minimal. The result is that in the 'lighthouse' districts there has been curriculum stagnation. The effects of Equal Opportunity on curriculum have been more a 'levelling down' than a 'evening up'.
>
> Later, in answer to a question, Mr. Malmberg said that he felt there had been some 'leveling up' — better teachers, buildings and programs — in the rural and poorer urban districts during the first two or three years of Equal Opportunity. Now, I think we are beginning to lose the dynamic and there is going to be a 'leveling down', he added. * * *
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> * * * 'It is no secret', he said, 'that when school boards lost their fiscal independence in 1967 they felt that they had lost their manhood, for this independence to most school boards represented local control of education. The most significant decision making function that they lost is control of raising money and determining how to spend it in education. It is my impression that it has been more difficult to get good people to serve on school boards since the advent of Equal Opportunity and that school boards have not taken their duties as seriously as they did previously. To retain local interest in schools, it is essential to have a large measure of local control. This is a challenge New Brunswick now faces.' " Advisory Commission on Inter-Governmental Relations, *Who Should Pay for Public Schools* (1971) at 12-13.

A similar lack of enchantment with full state funding appears to have set in in Hawaii. There full state funding was an inheritance from territorial government. After

experience under this program, the Hawaiian Legislature by Act 38 of the Regular Session of 1968 (now codified as Hawaii Revised Statutes Section 27.1) adopted an act restoring to the counties the power to supplement state funds for school construction and transportation. The act in question was "declared to be an urgency measure deemed necessary in the public interest" by its preamble. The preamble went on to recite:

> "Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the state's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government."

Dissatisfaction with the consequences of full state funding in Hawaii has not been confined to its legislature.* The Supreme Court of Hawaii in its opinion in *Spears v. Honda*, 51 Hawaii 1, 7 (1968), a case invalidating a program providing bus transportation for private and parochial school students, alluded to the uniquely significant position of private schools in Hawaii which had survived throughout the present century and went on to refer to the "stinginess" of the Hawaiian Legislature with respect to appropriations for public schools and to the universal mediocrity of Hawaiian public schools under the full state funding system:

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* Full state funding in Hawaii has limited local initiative. Contrary to plaintiffs' postulate, it has not eliminated inequalities but merely rendered them less visible. Salaries per pupil in 1970-71 varied from $407 in the Nimitz School to $1181 in the Hookena School, against a state average of $597. Hawaii Public Education Department, District Summary of School Expenditures, 1970-71.

> "The gap in the quality of education provided by public schools and the quality of education provided by private schools is still reflected today in the ratings given to the various high schools in the State by the Accrediting Commission for Secondary Schools of the Western Association of High Schools and Colleges. About 44% of the non-public high schools received the highest rating possible while none of the public high schools received such rating."

One consequence of the imposition of ceilings upon expenditures in the "wealthier" districts would be a tendency of residents of these districts to resort in greater measure to private schools. This phenomenon has been noted in the aftermath of the abolition of the District of Columbia Track System in *Hobson v. Hansen*, and was pointed to as a probable consequence of the relief sought by the court in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) at notes 37-38. See also Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583, 595 (1968). In response to this very real possibility Professor Coons and his colleagues have tendered two answers. Their first suggestion is that exercise of the right to private education should be further burdened; in Dr. Coons' words "of course, it is up to the state as to whether they can do that." (Mondale Committee Hearings pages 6883-84). See also Coons, Clune and Sugarman, Private Wealth and Public Education at 277-78; Mondale Committee Hearings at page 6884 (testimony of Mrs. Sarah Carey). It is in addition suggested by Professor Coons and his colleagues that "further, it seems appropriate for the court to view the class 'children' as simply a subgroup of the class 'poor'. Realistically, all children are poor * * * such separation of the interests of child and parent could be enormously significant in future encounters among pupils parents and the state on issues ranging

from compulsory education to school finance." Coons, Clune, and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111, 115 (1972). It may be that this Court's recent opinion in the *Yoder* case has somewhat dampened the enthusiasm for this line of argument. The second answer of Professor Coons and his colleagues with respect to the possibility of flight to private schools, is the perhaps somewhat cavalier observation "if these families desert public education it is hard to see that much is lost." *Id.* at 118. The difficulty with this attitude is that much of the present political support for state as well as local education programs emanates from the "wealthy" suburban constituencies in which the flight to private education may well take place.

Imposing a rule requiring full state funding would be to decree that no new educational program could be embarked upon until it attained majority support in the state as a whole. It is part of the genius of our federal system that no such stultifying barrier to progress or greater expenditure is imposed upon the lower levels of government. The existence of national programs commanding majority support in the nation is not held to preclude the existence of state programs commanding statewide majorities but unacceptable to a national majority. Similarly, the existence of statewide programs commanding statewide majorities is not viewed as inconsistent with the survival of local programs commanding majorities in particular localities but not in the state as a whole and, indeed, the lack of majority support at any level of government for a public program does not under our system preclude individual private expenditures for social desiderata not publicly recognized. Surely this feature of our system of government has been conducive to progress. Many educational innovations now accepted by state majorities including special education for handicapped pupils,

kindergarten programs, school breakfast programs and the like were pioneered in "wealthy" local school districts. While plaintiffs profess to seek a decree which would allow local districts to raise added funds by taxing themselves more heavily and turning over a large portion of the added proceeds to other districts, the authors of their scheme recognize that in practice full state funding or fully state controlled funding will be the result of the relief sought. The obliteration of the local level of discretion is effectively demanded by plaintiffs' complaint; its sponsors have made plain that campaigns against private and state discretion will shortly follow. Wholly apart from the inconsistency of this design with a constitution which breathes from every pore of its language hostility toward an overly strong national government, can it be supposed that this program is the way to maximize public expenditures on education?

As the somewhat incredulous court in *McInnis v. Shapiro*, 239 F. Supp. 327, 331 n. 11 (N.D. Ill. 1968) observed when first confronted with claims similar to those urged by plaintiffs here:

> "Surely, quality education for all is more desirable than uniform, mediocre instruction. Certainly, parents who cherish education are constitutionally allowed to spend more money on their children's schools, be it private instruction or higher tax rates, than those who do not value education so highly."

That the end result of a Rodriguez rule, and the regime of full state funding enforced by it will be a reduction in total educational spending is apparent:

> "[A]t least some of the support for statewide financing in California is coming from people who see it as a way to hold down school costs. Taxpayers who have fought school tax increases and been outvoted in their local districts are now pressing to move the decision

up to the state level. The lobbies for school improvements tend always to be strongest at the local level. That, in fact, is one reason for the local disparities. Districts with equal wealth choose to tax themselves at different levels. Whatever benefits statewide financing might bring to California's schools, the character of state politics under Governor Reagan suggest that it will not necessarily increase the money spent on them."

Anderson, *Study in California: Financing Schools: Search for Reform.* Washington Post, May 31, 1972.

LACK OF RELATIONSHIP BETWEEN EDUCATIONAL SPENDING AND EDUCATIONAL ACHIEVEMENT

The opinion of the *Rodriguez* court is unclear as to whether the gravamen of the constitutional violation found by it consists of the denial of education of equal quality to children in disfavored districts or rather consists of imposition by the state of an unfair relationship between taxes and benefits. As previously noted, if the constitutional violation is founded upon the second theory, the court's position is entirely untenable in light of the rule of *Carmichael v. Southern Coal Company,* 301 U.S. 495, which makes clear that there is no constitutional requirement of a relationship between taxes and benefits. Thus it would seem that the *Rodriguez* plaintiffs found their claim on the proposition that the state is providing their children with education of inferior quality. Certainly they do not urge that matters of taxing and spending generally are to be subject to a strict scrutiny test. Indeed, it is clear that even the rational basis test does not apply to such purely fiscal determinations as to which the powers of legislatures, state and federal, have traditionally been held to be almost plenary. Since the decision rests upon the premise — rejected by Judge Harvey in his eloquent opinion in *Parker*

v. Mandel — that there is something peculiarly significant about the detriment resulting to Plaintiffs from the system of educational finance, it was incumbent upon the plaintiffs to show a significant relationship between educational spending and educational achievement. This burden they did not and cannot sustain.

Even cursory review of the evidence in the record reveals that the disparities in spending between varying school districts are largely, if not entirely, explained by two factors: (1) variations in teachers' salaries, largely reflecting similar variations in wage levels and prices in varying portions of the state; and (2) variations in class size. The available studies on the relationship of educational spending to educational achievement speak with almost one voice on the insignificance of such differences. As is well known, the most extensive study of these relationships is that contained in the so-called Coleman Report, U.S. Office of Education, *Equality of Educational Opportunity* (1966). That report concluded:

> "It is known that socio-economic factors [of the students] bear a strong relation to academic achievement. When these factors are statistically controlled, however, it appears that differences between schools account for only a small fraction of differences in pupil achievement."

The Coleman Report found that the teacher pupil ratio "showed a consistent lack of relationship to achievement among all groups under all conditions" (p. 312). In addition the Coleman Report observed: "Differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students, that, with few exceptions, their effects fail to appear even in a survey of this magnitude."

The Coleman Report was no ordinary research study. It has been described as follows:

> "The study, *Equality of Educational Opportunity*, was hardly an everyday affair. Commissioned under the Civil Rights Act of 1964, one of the great bills of the Twentieth Century, sponsored by the United States Office of Education in a period of its most vigorous leadership, and conducted by leading social scientists at just the moment when incomparably powerful methods of analysis had been developed, the study was perhaps the second largest in the history of social science. Its findings were, if anything, even more extraordinary than its genesis. Stollesky and Lesser summarize these findings with admirable detachment: 'Coleman failed to find what he expected to find, direct evidence of large inequalities in educational facilities in schools attended by children from different majority or minority groups. The study set out to document the facts that for children of minority groups school facilities are sharply unequal and that this inequality is related to student achievement. Data did not support either conclusion. What small differences in school facilities did exist had little or no discernible relationship to the level of school achievement. In effect, the Coleman study was intended to prove beyond further question two central theses of the reform establishment: first that school facilities available to minorities were shockingly unequal; and second that this accounted for unequal outcomes. This, of course, was not found. Coleman's findings thus pose two equally difficult choices for the reform establishment. The first would be to conclude that the achievement of equality of educational opportunity — increasingly defined in terms of comparable educational achievement on the part of minority and majority groups — will require vastly greater expenditures of money and social effort than even they had envisaged. The second would be to conclude that improvement of schools as such should be downgraded in favor of a vast national

effort to liquidate the lower class, in Walter B. Miller's phrase, and thereby remove the apparently insurmountable — or at least not likely to be surmounted — restraint on educational achievement among lower class youth, especially in urban ghetto areas. Understandably, the reform establishment chose first of all to concentrate on Coleman's findings, rather than on their implications. . . . A major element in the responses of the reform establishment has been the manifest fact that, heretofore, the public generally has been more willing to consider changes in educational institutions than economic and social institutions. Coleman must be taken to suggest that reform will be considerably more difficult to achieve than has been expected. This is rarely welcome news, and has accordingly been resisted'." Moynihan, "Sources of Resistance to the Coleman Report", in Harvard Educational Review, *Equal Educational Opportunity* at 25, 26, 28-29, 30 (1969).

The Report's conclusions have gained much professional respect. See, *e.g.*, the article by former Dean of Harvard Graduate School of Education, Sizer, *Low-Income Families and The Schools for Their Children*, 30 Pub. Admin. Rev. 340 (1970); and Cohen, *Policy for the Public Schools: Compensation and Integration*, 38 Harv. Educ. Rev. 114 (1968). Re-analyzing the Coleman data, a later study arrived at the same conclusion. 1 U.S. Commission on Civil Rights, Racial Isolation in the Public Schools 86 (1967).

The Coleman Report was a disinterested study. There is no reason to believe that the conclusions reached in it were in any way palatable to Professor Coleman or its other authors, rather the contrary. See Schoettle, *Equal Protection Clause and Public Education*, 72 Columbia Law Review at 1378-1388 (1972). Subsequent to publication of the Coleman Report:

"A recently published re-examination of the Coleman data by a score of eminent social scientists in a faculty seminar at Harvard University has confirmed the findings of the original report, while avoiding some of the original report's methodological problems. Indeed, this re-examination indicates that the influence of school expenditures on student achievement is even weaker than was indicated by the original Coleman Report. See Mosteller and Moynihan, *A Pathbreaking Report* in *On Equality of Educational Opportunity* 36-45 (1972); Jencks, *The Coleman Report and The Conventional Wisdom* in *Id.* 69-115; Smith, *Equality of Educational Opportunity: The Basic Findings Reconsidered* in *Id.* 230-42." (Goldstein, *Inter-District Inequalities in School Financing; A Critical Analysis of Serrano v. Priest and Its Progeny,* 120 University of Pennsylvania Law Review 504, 520, note 50 (1972).

This recent re-examination of the Coleman Report concluded that the best way to deal with the educational problems of poor children, whatever their race, was to improve the jobs and incomes of their families and also concluded that increased spending on schools had little effect on the educational performance of either lower class children or other children. The Jencks study concluded "the least promising approach to raising achievement is to raise expenditures since the data gives little evidence that any widely used school policy or resource has an appreciable effect on achievement scores."

The findings of the Coleman Report are supported by numerous prior studies. Among them is the leading British study of these matters, the so-called Plowden Report. Central Advisory Council on Education, *Children and Their Primary Schools* (2 Volumes, 1967). The findings of this report have been summarized by Professor Guthrie, Kleindorfer, Levin and Stout, as follows:

"Except for the fact that the study limits itself to a concern for elementary school students, its findings and the controversy surrounding them are not very different from those produced by the Coleman Report in this nation." (Guthrie, et al., at page 74.)

The regression analysis undertaken as part of the national survey of primary education in England reached the conclusion that:

"The specific contributions made by the variation in parental attitudes are greater than those made by the variation in home circumstances, while the latter in turn are greater than those made by the variations between schools and teachers that we have taken into account." (*Id.* Volume II at 188.)

The *Encyclopedia of Educational Research* (1950), observed in summarizing over 200 research studies on class size:

"On the whole the statistical findings definitely favor large classes at every level of instruction, except kindergarten . . . The general trend of evidence places the burden of proof squarely upon the proponents of small classes."

The President's Commission on School Finance recently specially commissioned a survey of the available literature relating to the effects of additional school spending on educational performance. Its final report concluded:

"The relationship between costs and quality in education is exceedingly complex and difficult to document. Despite years of research by educators and economists, reliable generalizations are few and scattered. * * * The conviction that class size has an important or even a measurable effect on educational quality cannot be presently supported by evidence. A review of a great body of research on the effects of class size (pupil-teacher ratios, to use a technical term) yields

no evidence that smaller classes, of themselves, produce more or better education in any accepted sense. Nor, conversely, has it been shown conclusively that larger classes, of themselves, provide less or poorer education to children — and they obviously cost less." President's Commission on School Finance, *Schools, People and Money, Final Report* (1972), at x-xi.

"In a study prepared for this Commission by a distinguished research organization, all available research projects were examined in an effort to determine the effect of class size on educational effectiveness. This study — which examined the body of research in this area — found no discernible difference in student achievement even though classes ranged from 18 to 1 up to 35 to 1 * * *. Despite diligent searches and widespread opinion to the contrary, the Commission finds no research evidence that demonstrates improved student achievement resulting from decreasing pupil-teacher ratios."* (*Id.* at 59.)

The implication of these studies for the relief sought by plaintiffs has been pointed out by many commentators. Thus, it has been rather succinctly observed that:

"Any reshuffling of dollars — if spent within the present range of variability on more highly paid teachers, reductions in class size, and buildings — is not likely to have much effect on the tested cognitive skills, or the credentials necessary for entrance into honors programs, jobs or college or on the values of the children. What the reshuffling of dollars will do is reshuffle teacher salaries in rough proportion. That such a result will not materially alter the outcome of schooling for the child should not be all that surprising. Teachers, like the rest of us, are not paid for how well they perform (even if we could define what performance means)." Dimond, *Serrano: A Victory of Sorts for Ethics, Not Necessarily for Education*, 2 Yale Review of Law and Social Action 133, 137 (1972).

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* See The Rand Corporation, *How Effective is Schooling* (1972).

Yet another report has recently reached similar conclusions. Center for Educational Policy Research, *Education and Inequality: A Preliminary Report* (1971) at 47-64. See also Wynne, *The Politics of Accountability: Public Information About Public Schools* (1972).

The observations of other commentators to similar effect are legion. Thus, Professor Moynihan has observed (*Can Courts and Money Do It?*, New York Times, January 10, 1972 page 1): "the only certain result that will come from this [the *Rodriguez* decision] is that a particular cadre of middle class persons in the possession of certain licenses — that is to say teachers — will receive more public money in the future than they do now."

Similarly, Professor Roger Freeman of Stanford has observed: (*Address to the Annual Meeting of the National School Boards Association*, April 14, 1972):

> "Added school spending provides sizable benefits to teachers and administrators in the form of more and better paid jobs, greater amenities, and reduced work loads. Its tangible advantage to children's education has yet to be demonstrated."

The findings of the Coleman Report have met with little significant dispute. The only substantial work purporting to dispute the Coleman findings is the study by Guthrie, Kleindorfer, Levin and Stout, *Schools and Inequality* (1972). That work is scarcely a disinterested work of scholarship. It was sponsored and paid for by the National Urban Coalition which, the authors tell us, "was specifically interested in supporting an objective study relevant to a Michigan court case of national significance for education * * * The Board of Education of the School District of the City of Detroit had filed a complaint alleging that Michigan's governmental arrangements for education, violated * * * the Equal Protection Clause.* Given

* The suit was later dismissed for want of prosecution.

this concurrence of interest, we accepted the National Urban Coalition offer of assistance." (*Schools and Inequality* at xvi). Only the fourth chapter of the resulting book is devoted to the relation of school services to student achievement. However, the study undertaken by these four writers, a fragmentary description of which appears at pages 84 through 90 of their book, was not a study of the relation of monetary inputs to educational performance. The extent of the study undertaken or correlations found by them has not been clearly disclosed and it appears that the more significant correlations found related to such matters as the relation between student achievement and such non-monetary variables as teacher morale, teacher verbal ability and the percentage of students transferring into the school — variables which bear no necessary relationship to school spending or at least no demonstrated relationship to school spending. Indeed, notwithstanding the fact that the Guthrie-Levin book is frequently cited as contradicting the Coleman study, when the matters studied in it were put to the test in litigation in Michigan none of its authors appeared as witnesses in the extended trial in the Michigan school finance case.* This is scarcely surprising, since Professor Guthrie had shortly before testified in a Michigan law suit involving metropolitan school desegregation problems, *Bradley v. Milliken*, U.S. Dist. Ct. E.D. Mich. No. 35257 that:

> "Q. Does your familiarity at the moment permit you to agree with me to the effect that the general, returning to the implications of Mr. Ritchie's question, the approach of additional dollars without more would seem on the basis of the [Moynihan and Mosteller] reanalysis [of the Coleman Report] as well as the other

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* *Milliken v. Green*, Mich. Cir. Ct. Ingham County, No. 13664-C (1972).

data to which you referred, to be inadequate in terms of the problem? A. My response to Mr. Ritchie's question was not based very much on the Coleman Report, rather it was based on my work with Senator Mondale's Select Committee on Equal Educational Opportunity where I have come to see almost every effort we have made at putting additional dollars on the head of poor children has somehow never occurred because we have never gotten the additional dollars there. As Senator Mondale says 'Everytime we try to help poor children in this nation, someone robs the train on the way'. That seems to be what happens when you look at actual delivery of Title One dollars to poor children, it often doesn't get there and a volume which has been mentioned here, Schools and Inequality, for the State of Michigan, myself and colleagues found a negative relationship between the child's income and the amount of federal money being spent on him. Well, it wasn't a negative it was a positive relationship, poor children were not having money spent on them in Michigan the way it was alleged to be the case .

Q. If the dollars got there, but nothing else was changed, including social SES composition and racial composition, would you be optimistic about the dollars spent? A. No, I would not be optimistic even if the dollars were changed by thousands." (Transcript of hearing, pages 523-524.)

Elsewhere at the same hearing Professor Guthrie referred to socio-economic status as "to date the best explainer of a child's school achievement that we have. It is a more powerful explainer than race, for example." (at 450).

Professor Guthrie's colloborator, Professor Levin, similarly appears to hold to the view that the limited additional increments of funds which "poor" districts would get from an application of the *Rodriguez* doctrine would

be of negligible educational value. Dr. Levin testified before the Senate Select Committee on Equal Educational Opportunity (Hearings, part 7 page 3516) as follows:

> "One of the problems is that additional dollars, as they move into the educational system, have never really been married up to education * * * They have not thought about why the particular techniques approaches, and resources that they have used have failed the same children in the past. They have not questioned whether just larger quantities of the same resources that have failed children in the past are going to succeed * * *".

After an extensive trial concerning these cost-quality issues, in a state unique for its possession of a statewide educational measurement program, the Circuit Court for Ingham County, Michigan made the following findings, among others:

> "1. A statewide comparison of State Equalized Valuation Per Pupil v. Composite Achievement reveals a low correlation between test scores of 4th and 7th grade composite achievement tests and SEV. (Ex. 127, 81, 82; Tr. 2716, 2778.)
>
> 2. A statewide comparison of Total Current Operating Expense Per Pupil v. Composite Achievement reveals a low correlation between test scores on 4th and 7th grade composite achievement tests and Total Current Operating Expense. (Ex. 127, 88, 89; Tr. 2224.)
>
> 3. A statewide comparison of Total Instructional Expense v. Composite Achievement reveals a low correlation between test scores on 4th and 7th grade composite achievement tests and total instructional expense. (Ex. 127, 90, 91; Tr. 2778.)
>
> 4. A statewide comparison of Student Evaluation of Socio-economic Status and State Equalized Valuation Per Pupil reveal a low relationship (Tr. 2716 and 2778.)
>
> 5. A statewide comparison of Student Evaluation of Socio-economic Status v. Composite Achievement

reveals a moderate correlation between test scores on 4th grade composite achievement test and a student evaluation of SES and a high correlation of test scores of 7th grade composite achievement and student evaluation of SES. Accordingly, statistical analysis of the relationship between student evaluation of SES and composite achievement scores reveals a high degree of relationship. (Ex. 127, 97, 98, Plaintiffs' Ex. 80; Tr. 2291, 2293.)

6. An analysis of the data compiled by the Michigan Department of Education contained in Exhibit 32, using the stepwise mutliple regression-technique indicates that there is a low statistical relationship between monetary inputs and achievement output (Tr. 2634). Thus, the low degree of relationship between financial inputs and achievement outputs found in the uni-variate statistical analysis (scattergrams and correlation coefficients) is confirmed in the multivariate context (stepwise multiple regression equation) (Tr. 2636). On the other hand, in both the univariate and the multi-variate context the relationship of SES to composite achievement is moderate at 4th grade and moderately high to high at 7th grade level (Tr. 2638).

7. A statewide analysis of the data contained in Exhibit 32 using the factor analysis technique of 7th grade data, reveals that SES and composite achievement are contained in the same family of variables (Ex. 122; Tr. 2672). Thus, SES appears to be related to the same factor that achievement is related to (Tr. 2672). However, all of the monetary resource variables (SEV, local revenue, and state aid) are found to belong to an entirely different factor (Tr. 2672-73). This indicates that student achievement and SES are operating independently of monetary resources."

Clearly, even a cursory examination of the pertinent educational literature reveals that there is no necessary cost-quality relationship or, at the least, that these issues are highly debatable. Under these circumstances it is

apparent that this case is about taxes and expenditures and not about education and that the state governments possess a rational basis for declining to appropriate the approximately ten billion dollars necessary to produce abstract monetary equality with its concomitant detriments to local fiscal control and to the future willingness of voters and legislators to avail themselves of, or appropriate funds for, public school systems. It is hardly appropriate for this court, or any court to try these disputed cost-quality issues; it is no more within the province of courts than it is within the province of legislators, in the face of the conflicting scientific evidence, to make of Professor Guthrie an American Lysenko. Cf. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

LACK OF RELATIONSHIP BETWEEN PROPERTY AND INCOME

The essential thesis of the present wave of lawsuits is that there is a necessary connection between variations in the wealth of school districts and variations in the educational outcome of their individual students. But if there is one thing that the literature of this field makes entirely clear it is not merely that there is no connection between educational spending and educational achievement but also that there is no necessary connection between district wealth defined in terms of property and educational spending. The effort to translate the necessary consequence of the division of the nation into different organs of state and local governments into a deprivation of individual rights must hence fail.

It has been elaborately and repeatedly demonstrated that the property wealth standard utilized by the California and Texas Courts bears no necessary relationship to the individual wealth of residents of the affected school

districts and that in no sense is the alignment of school districts a discrimination against poor persons. Even Professor Coons and his colleagues have conceded:

> "The distinction between collective and individual wealth is worth considering. *Serrano* forbids discrimination in education upon either basis, but it is likely that the proof required at trial will be confined to the wealth of school districts. At present it is very difficult to specify the degree to which personal and school district wealth coincide. The economists seem confident that the relation is positive but the anomalies are frequent and sometimes embarrassing. Not only do poor people inhabit rich industrial enclaves with low populations, but they also are found in large numbers in certain large cities, a few of which for school purposes, are relatively well off (e.g. New York and San Francisco — a primary cause is significant private school enrollment). Equally troublesome, perhaps, the rich sometimes live in tax poor areas. *Serrano*, thus, is not a one edged blade for the war on poverty." 2 Yale Review of Law and Social Action at 114.

Professor Coons and his colleagues did not identify the economists who concluded that there is a positive relation between personal and school district wealth. But careful studies of the relationship of income to property wealth in two states, Kansas and California, have effectively exploded this notion. In Ridenour and Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 Kansas Law Review 213 (1972) the authors observed: "the application of a definition of wealth that relies only on assessed property valuation in Kansas would result in effective discrimination against taxpayers with little income". It further observed, citing a similar study in California (Davies, *The Challenge of Change in School Finance* in National Education Association, Tenth Annual Conference on School Finance 199 (1967)):

"The practical result of the *Serrano* rationale in California and Kansas is to strike down de jure discrimination between pupils on the basis of assessed value per-pupil in favor of a scheme of de facto discrimination on the basis of income per-pupil" (at 224.)

It is even more dramatically observed:

"It was pointed out in the previous section that a study in California found only random correlation between districts having high assessed value per-pupil and those having high income per-pupil. On the basis of the foregoing figures it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per-pupil have low assessed value per-pupil and districts with high assessed value per-pupil have low income per-pupil" (at 225.)

The study by Davies of California concluded:

"California's present criterion of wealth imputes to the high wealth counties ability, that, on the basis of income, they do not possess. Ability to finance education may be exaggerated. These counties can raise equivalent sums of money only by apportioning a relatively greater share of income to taxes." Tenth Annual Conference on School Finance at 200.

These articles point out that in many states the net effect of a change from the present system of school finance to a system of school finance fully consistent with *Rodriguez* and *Serrano* may be to burden more heavily the low income taxpayers. In the authors' words, the *Serrano* court's "conclusion fails to recognize that there is no guaranteed relationship between ownership of property and a fixed yield from it" (at 224).

The detriment to minority group pupils as a class from the decision in *Serrano* has already been noted, 59% of such pupils living in districts with above average property valuations.

Nor is this all. The New Brunswick experience is illustrative of another possible consequence of the *Serrano-Rodriguez* rule. There, the introduction of full state funding was accompanied by a shift from the property tax to an even more regressive sales tax:

> "One of the elements that helped sell Equal Opportunity to the people was the fact that it represented 'a shift away from direct taxation as exemplified by property taxes . . . toward indirect taxation — the sales tax,' explained Mr. Arsenault [principal Secretary to the present Prime Minister]. 'Property taxes especially went down.'" Advisory Commission on Inter-governmental Relations, *Who Should Pay for Public Schools* at 10.

Thus, not only on the expenditure side but also on the tax side it is possible, indeed probable, that introduction of the *Rodriguez-Serrano* rule may be actually detrimental to spending on the education of children of low-income families.

It should further be noted that the lack of relationship between low district property values and low educational achievement is exacerbated by another factor: the extreme present reluctance of many low property value districts because of low educational costs in rural areas to make even an average tax effort for education. The importance of this effort factor was noted by the court in *McInnis v. Shapiro*, 203 F. Supp. at 333 (N.D. Ill. 1968). It is also dramatized by the study of a state commission in Maryland which revealed that a large part of the lower expenditures in many smaller rural counties was accounted for not by lower resources but by lower tax effort. See the table on "Effect of Differences in Effort" in [Maryland] *Commission to Study the State's Role in Financing Public Education, Background Information* (May 1970), pg. 68.

A REPRESENTATIVE STATE AID PROGRAM

It is the thesis of the framers of plaintiffs' theory that legislatures are incapable of independently re-examining state aid programs unless prodded to do so by courts, that state aid formulas constitute examples of "settled wrong", that existing state spending patterns and school district lines should be viewed for purposes of constitutional assessment as though each state had a single united state school system, that existing formulas are capricious, unjust, and irrational, and that the explosion of legislative creativity they profess to desire is dependent upon judicial invalidation of existing formulas. Examination of the history and rationale of state aid to education in a representative middle-sized state, Maryland, is sufficient to explode all these notions.

In Maryland, as in Virginia, North Carolina, and some Southern states, school district lines correspond exactly to the long established district lines of Maryland counties, just as in many New England, Midwestern, and Western states school district lines correspond exactly to town and township lines. The Maryland counties were established at early dates. Eleven of the 24 subdivisions were established within their present borders prior to 1695; all but six of them were established prior to the ratification of the Constitution of the United States; and all but one of them were established prior to ratification of the Fourteenth Amendment, the most recent erection of a Maryland county having taken place in 1872. The dates of origin of the Maryland counties are as follows: St. Mary's 1637, Kent 1642, Anne Arundel 1650, Calvert 1650, Charles 1658, Baltimore 1659, Talbot 1662, Somerset 1666, Dorchester 1668, Cecil 1679, Prince George's 1695, Queen Anne's 1706, Worcester 1742, Frederick 1748, Caroline 1773, Harford 1773,

Washington 1776, Montgomery 1776, Allegany 1789, Carroll 1836, Howard 1851, Wicomico 1867, Garrett 1872. See generally Maryland Geological Survey, *The Counties of Maryland, Their Origin, Boundaries and Election Districts* (1907), 426-572. Article 13, Section 1 of the Maryland Constitution of 1867, still in effect, effectively forbids the erection of new counties by providing that no new county shall contain less than 400 square miles or less than 10,000 inhabitants nor shall any existing county be reduced to less than the same amount in order to form a new county.

Maryland school boards possess no independent taxing authority. The taxes levied for schools are levied by the county governments and that of Baltimore City and included in county budgets. The counties are accorded by the state power to impose unlimited property taxes as well as limited local income taxes and various other taxes. No Maryland subdivision has exhausted its taxing authority apart from the property tax; each subdivision is empowered to levy taxes which it does not levy. The Maryland counties accord varied exemptions from their local property taxes (See *28th Biennial Report of the Maryland State Department of Assessments and Taxation* at 19-22.) Real property assessment is carried out and organized on a county basis under the supervision of a state agency. (Maryland Code, Art. 81, §§ 232 ff.). In no sense does Maryland have a unified school system.

Maryland once had a state school system, created by Article VIII of the Maryland Constitution of 1864, which provided for a state property tax to be distributed to the counties on a per pupil basis and for a powerful State Superintendent of Schools. The Convention adopting the present 1867 Constitution expressly repudiated this state system in favor of a system under local control. See the

Report of the [Maryland] School Law Revision Commission (1968), at 27, summarizing the history and see Perlman (ed.), *Proceedings of the Maryland Constitutional Convention of 1867*, at 200-202: "The economic expenses of the system, the mode of raising the money and the mode of expending it, and the power of the superintendent, are all reasons why this system should be dispensed with. * * * The whole system has radical, fundamental objections. It would be supposed that it would be right to commit the expenditure of those funds to those who contributed them, but these funds are placed beyond the control of every parent and guardian in the State; those who bear the burdens are denied all share in their direction." (Remarks of Delegate Kilbourn). "Concerning the [state] system, he would say that it required an infallible head and an inexhaustible treasury. [Laughter]" (Remarks of Delegate Farnandis).

The limited remaining powers accorded the State Superintendent of Schools under the legislation adopted under the 1867 Constitution are generally inapplicable to the Baltimore City system (see Md. Code, Art. 77, §§ 142-145), which is independent of most of these mild measures of state control. The existence of large county school districts has always limited disparities in school spending in Maryland, as has the fact that each county contains groups of widely varying income. Indeed, "the formation of single county wide school districts — as in Maryland and Nevada —is often advanced as a solution to resource disparities among school districts." Advisory Commission on Intergovernmental Relations, *State Aid to Local Government* (1969), at 49; *Mondale Committee Hearings*, at 8473. Nonetheless, Maryland has taken many measures to further equalize school spending. The initial such measure was taken by the adoption of a comprehensive school aid

formula by Chapter 383 of the Maryland Acts of 1922. That formula was not the creation of a rustic legislature. It was prepared under the sponsorship of the General Education Board of New York by Dr. Abraham Flexner of Johns Hopkins, best known for his work leading to the reform of medical education in the United States.* The formula adopted anticipated that summarized the next year in the pioneering work by Professors Strayer and Haig, *Financing of Education in the State of New York* (1923), of which Professor Coons and his colleagues have written:

> "The pioneer effort to translate the philosophy of equal education opportunity into a viable state finance program adjusting for district wealth variation was made by George E. Strayer and Robert M. Haig in 1923 and later refined and developed by Paul R. Mort." (*Private Wealth and Public Education* at 63.)

The 1922 act provided for a foundation program of education in each county based upon set-pupil-teacher ratios, a state minimum salary scale graduated to qualifications and experience of teachers and additional allotments founded on the theory that teachers' salaries should constitute not more than 76% of total current costs. The portions of this program which could not be financed by the counties from a uniform tax were paid for by the state equalization fund.

In the years following its enactment, the program was periodically reviewed and progressively amended. In 1927 a state retirement program for teachers was added; in 1929 a state program of education for the handicapped was added; in 1933 aid to transportation costs was added and in 1939 differentials between elementary and secondary school salary scales were eliminated. "This became known as the Maryland Single Salary Scale because Maryland was in the

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* See Flexner and Bachman, *Public Education in Maryland* (1921), at 8.

vanguard of this progressive advance." (*Report of the School Law Revision Commission* at 12.)

In 1941, the program again underwent extensive review by eminent authorities from outside of Maryland, the state engaging the services of Dr. Herbert Bruner of Teachers' College, Columbia University to direct a study for the Maryland School Survey Commission. The report concluded:

> "In the intervening twenty-five years [since the Flexner report] strong leadership in the state department combined with active and capable local initiative, has brought to fruition many of the recommendations which the General Education Board Survey Commission made." "The present system of state aid in Maryland is one of the most advanced in the county." (at 63).

In the same year, a court in Maryland (Chesnut, J.), approvingly quoted a bulletin of the United States Bureau of Education describing the program in glowing terms as "in a sound and relatively satisfactory way, equali[zing] school burdens, revenues, and educational opportunities." The opinion listed in detail "the outstanding features of the Maryland system of school support." *Mills v. Lowndes*, 26 F. Supp. at 797 n.3 (D. Md. 1939).

Following the war, the program underwent extended review by two distinguished state commissions, the Sherbow Commission (1948), and the Green Commission (Maryland Commission to Study Public Education and Finances) (1952). The latter of these Commissions, in summarizing the history of educational progress in Maryland, noted the pioneering role in introducing new programs played by bell-wether school districts. Neither of these Commissions recommended full state funding, both noting the detriment that would result from it to Baltimore City, then the richest subdivision in the state and the only subdivision not to

benefit from the equalization fund. See the *Report of the Maryland Commission to Study Public Education and Finances* (1952), especially at pg. 55.

Various liberalizing recommendations of these Commissions were enacted into law, these including a revision of salary scales in 1947, an increase from $200 to $400 in aid for handicapped children and the addition of the twelfth grade to the foundation program in 1949, further salary increases in 1953 and 1955, creation of an incentive fund for school children in 1956, and creation of a program of aid to preschool handicapped children in 1957.

In 1958, the Maryland program underwent an unusually comprehensive review. The state again went outside its borders to engage the most eminent student of school financing in the nation. Professor Paul Mort of Columbia. The resulting study occupies a summary volume and thirteen printed volumes, issued over a period of three years, as follows:

Staff Study 1 — Stapleton, *Educational Progress in Maryland Public Schools since 1916* (1959);

Staff Study 2 — Dorn, *What Money Does and What it Does Not Do* (1959);

Staff Study 3 — Sartorious, *The Fortunes of Equalization in Maryland Since 1920* (1959);

Staff Study 4 — Zimmerman & Walker, *The Tax Potential of Maryland, State and Local* (1959);

Staff Study 5 — Zimmerman, *Fiscal Adjustments Over a Century* (1959);

Staff Study 6 — Woollatt, *The Measurement of Cost in Maryland Public Schools* (1959);

Staff Study 7 — Woollatt & Zimmerman, *An Economic Index of the Maryland Taxpaying Ability of Maryland Public School Systems* (1960);

Staff Study 8 — Willis, *A Program of Financing School Construction Designed to Safeguard the Current Operating Program in Maryland* (1959);

Staff Study 9 — The Growing Edge Committee, *The Maryland Schools and Mid-Century Needs;*

Staff Study 10 — The Staff Characteristics Committee, *Maryland's Twenty-four Instructional Teams;*

Staff Study 11 — Dorn, *The Allocation of School Expenditures in Maryland Counties;*

Staff Study 12 — Hardesty, *The Relation of Expenditures in Higher Education to Expenditures for Elementary and Secondary Education;*

Staff Study 13 — Rhodes, *Lay Participation in School Budget Development in Maryland.*

In the Staff Study dealing most directly with equalization problems, Sartorious, *The Fortunes of Equalization in Maryland Since 1920 (Staff Study No. 3)*, it was observed:

"It is well to bear in mind that the educational advantage of local participation in school support is that it frees the vigorous local units to forge ahead in meeting the problems education comes to face with in changing times. Such local units by their pioneering become leaders for the state" (page 9).

The Sartorious Study, by way of introduction, observed:

"New legislation has merely incorporated into this (state-local) partnership certain features that were inaugurated in the local school systems. That is to say that, in the main, improvement in the school system has taken place on certain local levels and as the idea spread it became part of the total state program. This means further that the partnership in respect to support has always lagged on the part of the state, but,

in fairness, it must be said that it has inevitably followed, and it is safe to conclude that it always will" (page 1).

From this summary characterization of the history of educational progress in Maryland the Sartorious Study concluded:

> "Equalization demands more than helping the poorer local units. It connotes equalization of an *adequate* program, but it certainly does not demand levelling down." (at page 11).

The Sartorious Study expressed concern that the equalization system then in operation in Maryland, while providing for a high degree of equalization in Maryland relative to other states, had not given rise to a high degree of local effort and that in consequence Maryland appeared to lack bellwether school districts in which new improvements might serve as an example for the entire state.

This concern was in accord with Professor Mort's concern for local tax leeway:

> "Paul Mort advanced a number of refinements in the Strayer-Harg plan with his associates and disciples at Columbia University. Among them were * * * 4) local tax leeway * * * The concept of local tax leeway provided for a downward adjustment of the rate of local contribution so that almost all districts would receive some state aid. Also the local district would have the discretionary power to tax itself beyond the local contribution rate in order to purchase its own unique program, presumably of a quality beyond the so-called state-mandated minimum." Garvue, *Modern Public School Finance*, (1969), 228-29.

Subsequent changes rapidly ensued. Increases in the salary component of the foundation program took place

in 1958, 1960, and 1961, increases in the basic aid component in 1960 and 1961, and an increase in the building incentive component in 1961.

The years following 1964 witnessed an explosion of creativity in educational finance in Maryland. Four major developments took place:

1. In the period 1964-1967, a distinguished state commission, the Maryland Commission on State and County Finance, recommended sweeping changes in the financing of education and other public services in Maryland, changes reflected in two major acts of the Maryland legislature, Chapter 17 of the Acts of 1964, and Chapter 142 of the Acts of 1967. By virtue of these changes, Maryland became the first state to consider income as well as property wealth in its state educational equalization formula, a change of particular benefit to Baltimore City. In addition, the state's first graduated income tax was enacted, supplanting a flat rate tax, and special subventions to the subdivisions for police services were provided for including a special lump sum appropriation to Baltimore City. This has been described as "a revolutionary change in support for Maryland schools. A unique feature is that per capita income is used as a factor in determination of the relative fiscal capacity of local school systems. * * * The elements making up the foundation program were raised to levels representing current average practice throughout the state * * *" A program of current expense incentive aid was created. "A notable improvement in this law was its establishment of a fixed percentage for the State's share in the foundation program." *Report of the School Law Revision Commission* (1968), at 29.

2. In 1968, another state commission, the School Law Revision Commission, after a study of equalization prob-

lems, refrained from endorsing full state funding or full equalization, recommending instead a focus upon the needs of urban districts.

> "The State should provide special, categorical financial aid for the education of children from an economically deprived environment. Such educational programs should be designed to compensate for the lack of prior appropriate learning experiences and to provide meaningful early childhood experiences before age six." (at 31).

The recommendations of this Commission were anticipated by the Legislature. By Chapter 142 of the Acts of 1967 the foundation aid program was extended to kindergarten children. By Chapter 754 of the Acts of 1969 and again by Chapter 4 of the Acts of 1970 a special program of "density aid" to Baltimore City created by the 1967 Act (see the similar suggestion by the Lawyers Committee for Civil Rights, Compact, April 1972, page 41) was enlarged and increased.

3. In 1970, another state commission, the Commission to Study the State's Role in Financing Public Education, recommended full state assumption of the costs of public school construction. The legislature, acting almost immediately, adopted this recommendation by Chapter 624 of the Acts of 1971, Maryland thus becoming the first state in the nation to fully assume school construction costs. In fiscal 1972, appropriations for this program approximated $150,000,000, raising the state's share of education spending from 31% to 39%. The budget estimate for this program for fiscal 1973 is approximately $300,000,000, all of it to be allocated by a state agency solely on the basis of educational need, which will further raise the state share of total school spending and will also operate to a considerable but as yet undetermined degree to elevate

the level of school spending in poorer counties to a figure closer to the state average. The Commission, though split on the issue, refrained from recommending full state funding of current expenses. Its recommendation that the state assume 55% of all existing current expenses in the several subdivisions, essentially a tax relief rather than equalizing measure, was not adopted, the legislature instead provided for distribution of an added fund of $22 million to subdivisions on a basis inverse to wealth by Chapter 4 of the Acts of 1970.

In 1971, another distinguished state commission, the Commission on the State Tax Structure under the chairmanship of Professor Edwin Mills of the Johns Hopkins Economics Department considered and rejected proposals for full state funding of education, recommending instead a program of general purpose grants akin to revenue-sharing to subdivisions with large numbers of persons below the poverty level. In rejecting full equalization of education, the Mills Commission observed:

> "Thus the relative burden of taxes in support of a particular program is very nearly the same in all jurisdiction [under equalization]. The problem with this approach is that each jurisdiction is forced to consume exactly the service level decreed by the State. Although it may be desirable to force or induce low income jurisdictions to consume a higher level of some services than they otherwise would, because of the State's interest in those services, it is not so clear that it would be desirable to force higher income jurisdictions to consume a lower level of services than they would prefer. If educational attainment is a desirable thing, the State surely doesn't want to be in the position of curtailing it in those jurisdictions that are likely to excel. State assumption of a local service is desirable only when a very large proportion of the benefits of a service are statewide and when most

> people desire similar levels of the services. This does not appear to be the case for education for example." (at 264).

It is thus clear that plaintiffs' proposals have not been neglected or ignored in Maryland, but rejected on their merits by disinterested public bodies.

One further instance of rejection deserves to be noted. In 1967, the abortive Maryland Constitutional Convention meeting in that year had before it a proposal to fasten on the state a rule substantially equivalent to that proposed by plaintiffs here. The proposal received extensive discussion. It was rejected on the floor of the convention after it was pointed out that such a provision "would discourage and frustrate local initiative", and effectively prevent or postpone new initiatives in education. Excerpts from the competing reports appear as an appendix to Kurland, *Equal Educational Opportunity*, in Daly (ed.). *The Quality of Inequality* (1968), at 67-72.

Professor Kurland accurately concludes:

> "The arguments addressed by the reports * * * are certainly relevant to the issue whether the Supreme Court should attempt to impose on all of the States what the delegates to the Maryland Constitutional Convention were unwilling to impose on their own state."

At present, state educational programs are continuing to undergo review in Maryland. The Governor's Education Counsel, a former superintendent of schools of one of the poorer counties, has opposed on principle full equalization or full state funding. Spigler, *Address to the Maryland Association of Counties*, January 20, 1972. The Governor, on June 1, 1972 appointed a new Task Force to consider reallocation of the presently available state funds in a fashion which "will avoid doing drastic damage to the

school system or taxpayers of any particular jurisdiction" and which "will require little, if any, increase in the very large sum of money ($343,425,540 in Fiscal Year 1971) that the State is already pumping into the local school system."*

Those advocating equalization at the Montgomery County level together with freezing of that county's expenditures have conceded that this *Rodriguez*-type approach would require additional revenues in Maryland of $200 million per year, equal to 3% on the present sales tax base. Wise, *School Finance Equalization Lawsuits: A Model Legislature Response*, 2 Yale Review of Law and Social Action at 130, precluding the state legislature for at least three years from "begin[ning] to set levels for education in competition with its assessment of needs for other public services." *Id.* at 130.

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* Existing disparities in Maryland are of a very modest order, and are largely attributable to the escalation of personal income in recent years in Montgomery County, the bell-wether subdivision — an escalation due in no small measure to the federal pay comparability program, and to the effects of the five-week Montgomery County teachers' strike in 1970. Cost per pupil for current expenses, including transportation in 1969-70 was $972.84 in Montgomery County. In the other 23 subdivisions in the state the range was strikingly narrow, from $597.92 in Somerset County on the eastern shore to $767.19 in Baltimore County. Selected Financial Data, Maryland Public Schools, 1969-70, Part I, Table II. These figures do not take into account the new state assumption of school construction which heavily benefits the rural counties since state funds are available on a need basis. There is no reason to believe that Montgomery County children are enjoying peculiar benefits. Recent comparative studies of educational achievement in the Montgomery County schools indicate that children in those schools perform slightly below the national average of children of comparable intelligence on nationwide tests. Washington Post, November 23, 1971 Pg. C-1. Indeed, by a number of measures, Montgomery County schools are worse off than Somerset County schools. 23.3% of Montgomery County teachers have less than 2 years' experience as against 14.7% in Somerset County, 63% of Montgomery County teachers have more than 5 years' experience as against 78.9% of those in Somerset County. Maryland State Department of Education, Experience of Teachers and Principals, September 1969, Table 1.

ADVERSE EFFECTS ON INTERESTS OF URBAN AREAS AND RACIAL MINORITIES

The relief granted by the *Rodriguez* and *Serrano* courts, far from being the advertised panacea to problems of minority and urban education is, as some of its original supporters have come to recognize, actually destructive of the interests of urban areas and the interests of minority children.

Nothing makes this clearer than consideration of the evidentiary material upon which the *Rodriguez* court purported to base its decision. The principal such piece of "evidence" was a lengthy narrative affidavit of Joel S. Berke of Syracuse University, filed at an extremely late stage of the litigation under circumstances which precluded the state from making effective reply. It has been observed of this affidavit that:

> "It is true that the three-judge federal district court which invalidated the Texas school financing system in Rodriguez found that 'those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income . . .' The basis for this finding was an affidavit submitted by plaintiffs and cited by the court. As a basis for the court's conclusion, this was a questionable source; a careful reading of the data contained in the affidavit creates grave doubt about the validity of its conclusions * * * The Rodriguez court cited the affidavit as showing a median family income of $5,900 in the ten districts with the highest tax base per-pupil and $3,325 in the four districts with the lowest tax base per-pupil [337 F. Supp.] at 282 n. 3. The following are the study's figures:

Market Value of Taxable Property Per Pupil	*Median Family Income From 1960*	*Per Cent Minority Pupils*	*State & Local Revenues Per Pupil*
Above $100,000 (10 Districts)	$5900	8%	$815
$100,000-$50,000 (26 Districts)	4425	32	544
$50,000-30,000 (30 Districts)	4900	23	483
$30,000-$10,000 (40 Districts)	5050	31	462
Below $10,000 (4 Districts)	3325	79	305

Affidavit of Joel S. Berke at 6 (footnotes omitted.)

"The five category breakdown of school districts seems to be arbitrary, and it is only this breakdown which appears to produce the correlation of poor school districts and poor people. Even on this breakdown, however, the correlation is doubtful. Note the very small number of districts in the top and bottom categories. Even more significant is the apparent inverse relationship between property value and median income in the three middle districts, where 96 of the 110 districts fall. While the family income differences among the three groups of districts are small, they may be even more significant if categories are weighted by the number of districts in each. At the very least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiants; this is, however, the study the court relied upon, and it is apparently the only study which purports to show such correlation." Goldstein, *Inter-District Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and*

Its Progeny, 120 University of Pennsylvania Law Review 504, 523 and note 67 (1972).

Professor Berke has since pursued his studies of the effects of the *Serrano-Rodriguez* rule and has reached conclusions dramatically at variance with those advanced in or at least suggested by his affidavit in *Rodriguez*.

Two monographs prepared by Professor Berke have since been published. Select Committee on Equal Educational Opportunity, United States Senate, *The Financial Aspects of Equality of Educational Opportunity* and *Inequities in School Finance* (January 1972). The second of these monographs considers the results which would obtain in the event that a state adopting the *Rodriguez* rule provided for full state assumption of the costs of education and equal per-pupil expenditures, the costs of this program being funded by a proportional income tax. The study notes that similar results would obtain if the state educational program where funded from another broad-based non-progressive tax such as a statewide sales or property tax. It need scarcely be labored that the line of least resistance for states confronted with a Rodriguez type decision will be movement to a statewide property tax. Professor Berke and his colleagues conclude in this study:

> "Despite the widespread enthusiasm that the California, Minnesota and Texas cases have raised throughout the nation, it is our belief that finance reform of the type just described will not result in removing the major inequities in American educational finance and *on the contrary may well exacerbate the problems of a substantial proportion of urban schools.* The results are rather sobering for those concerned about the urban financial crises. *In three-fourths of the cities in these large metropolitan areas, school taxes would rise and of the six exceptions to this tendency*

three are located in a single state, Ohio, and in a fourth the tax rates would remain virtually the same. The expenditure implications, however, are even more jarring. For this aspect of the analysis we have assumed that the local share of revenues assumed by the state would be re-distributed on an equal per-pupil basis throughout the state. * * * *Nearly twice as many central cities would receive lower expenditures from the states under equal statewide per-pupil distribution of funds than they presently receive under the existing revenue structure.* In a number of cases, for example, New York City, the proportion of income tax for educational purposes would rise from 2.5% to 3.1% yet the expenditures from local sources that were $694 in the 1970 school year would drop under an equal per-pupil statewide re-distribution of the state assumed local share to $636. In short, not only would New York be paying more, under equal per-pupil statewide re-distribution, it would be receiving less. * * * Under our revenue-expenditure model, educational resources are being re-distributed from large cities to other parts of the state. The reason for this phenomenon lies in the analysis already discussed * * * which showed that city tax rates for education were lower than in the surrounding areas because city tax rates for all governmental functions combined were higher than in other parts of metropolitan areas. The explanation for the expenditure effect has also been shown: city educational costs are considerably higher than those in other parts of the state; and, while expenditures in cities are not as high as their added costs and greater educational need requires, they are higher than expenditures in rural areas and in some suburban areas. Certainly, *city school expenditures usually are above the statewide average of districts, and thus, cities lose or only break even in plans that have equal per-pupil expenditures throughout the state or which 'level-up' to the state average.* To show the impact of our tax-expenditure model on cities and their suburbs, we took a random

selection of thirteen of the 37 largest metropolitan areas, and looked at a large central city and its county. * * * In six of the eight large cities in the Northeast and Midwest, suburban taxes would rise under state assumption, but the rise would be markedly less than in the cities in most cases. Both areas would be redistributing to non-metropolitan areas or to the least urbanized portions of metropolitan areas. In the South the tax impact of statewide assumption would permit the suburban counties in both metropolitan areas to reduce tax effort for education, while the cities would get either a lesser degree of tax relief or none at all. In the West, all three cities would have their tax effort increased, while that would be the case for only one suburban county. Table XVI shows the comparative central city-suburban expenditure results. * * * After equal per-pupil distribution of the state assumed local share, the third column shows the new statewide expenditure levels from what were formally local revenues. Only two of the eight Northeastern and Midwestern cities gain, while only one suburb does, and the rates by which the suburbs exceed the state average are substantially higher than in the cities." *Id.* at 66-69. (Emphasis added).

The Berke study contains (at 67) a detailed table which is instructive, and which is set out below.

TABLE XIV. — *Tax effort and expenditures implication under State assumption and equal per pupil distribution*

	Percent of income taxed for school purposes		Local expenditures per pupil		
	1970	Under State assumption	1970	Statewide equal expenditures	Local expenditures under statewide tax rate[1]
Northeast:					
Baltimore, Md.	3.4	3.7	$444	$538	$486
Boston, Mass.	2.5	3.6	522	632	741
Newark, N.J.	3.4	3.8	587	707	648
Paterson-Clifton-Passaic, N.J.	(2)	3.8	(2)	707	797
Buffalo, N.Y.	1.6	3.1	347	636	662
New York City, N.Y.	2.5	3.1	694	636	863
Rochester, N.Y.	3.0	3.1	697	636	727
Philadelphia, Pa.	2.0	2.7	444	446	593
Pittsburgh, Pa.	2.5	2.7	596	446	650
Providence, R.I.	2.9	2.8	701	477	678
Midwest:					
Chicago, Ill.	1.4	3.3	307	600	754
Indianapolis, Ind.	2.4	2.8	415	377	495
Detroit, Mich.	2.1	2.9	439	396	589
Minneapolis-St. Paul, Minn.	2.3	3.3	582	429	835
Kansas City, Mo.	(2)	3.0	(2)	408	428
St. Louis, Mo.	2.7	3.0	422	408	469
Cincinnati, Ohio	4.6	3.4	677	490	499
Cleveland, Ohio	4.8	3.4	749	490	530
Columbus, Ohio,	3.0	3.4	479	490	546
Dayton, Ohio	3.7	3.4	632	490	568
Milwaukee, Wis.	3.4	4.3	599	573	708
South:					
Miami, Fla. (Dade County)	1.6	1.8	287	383	324
Tampa-St. Petersburg, Fla.	1.3	1.8	222	383	315
Atlanta, Ga.	2.4	1.5	395	175	350
Louisville, Ky.	1.6	1.6	341	191	343
New Orleans, La.	1.5	1.9	261	212	325
Dallas, Tex.	—	2.2	(2)	275	409
Houston, Tex.	—	2.2	(2)	275	364
San Antonio, Tex.	—	2.2	(2)	275	259
West:					
Los Angeles-Long Beach, Calif.	—	2.9	(2)	433	531
San Bernardino, Riverside, Ontario, Calif.	—	2.9	(2)	433	403
San Diego, Calif.	—	2.9	(2)	433	423
San Francisco-Oakland, Calif.	2.5	2.9	709	435	817
Denver, Colo.	3.3	4.3	667	507	864
Portland, Oreg.	2.3	2.0	442	672	980
Seattle-Everett, Wash.	1.7	2.3	436	328	608

1 Local revenues that would be generated if the statewide rates were applied but the revenues raised by those rates were retained for local expenditure.
2 Not compiled.

The Berke table reveals that a shift from local to statewide property taxes coupled with distribution on an equal per-pupil basis, the probable political result of *Rodriguez*-type decisions, would be an almost unmitigated calamity for most large cities, including the cities of Boston, Buffalo, New York, Rochester, Philadelphia, Pittsburgh, Providence, Chicago, Indianapolis, Detroit, Minneapolis-St. Paul, Kansas City, St. Louis, Columbus, Milwaukee, Atlanta, Louisville, New Orleans, Los Angeles, San Francisco, Oakland, Denver, Portland, and Seattle. Virtually all these cities have poor and minority populations which greatly exceed the state average.

Professor Berke and his colleagues have summarized their findings as follows:

> "If * * * a statewide property tax is employed, and the rates are higher than the characteristically lower education tax rates of the central cities — total tax rates are higher in cities than in other regions of states because of the demand for general governmental services — *the results of Serrano type litigation would be higher taxation of urban areas for education than is currently the case.* If the alternative selected for the distribution of educational services is the equal expenditures approach rather than some measure of educational need, since large city educational expenditure levels tend to be higher than the average for the entire state — although they are generally lower than most of their suburbs — *the results of a school finance case could result in no additional urban expenditures and perhaps even a lowering of them to a rigidly enforced state norm.* In short, the result of one possible constitutional alternative — statewide assumption of educational costs through a state property tax and a distribution of educational services through an equal expenditures per child formula — could result in higher taxation of city residents for the benefit of education in suburban or rural areas." *Id.* at 33-34. (Emphasis added).

Professor Berke and his colleagues are not alone in these findings. The study conducted by the United States Office of Education, *Finances of Large City School Systems: A Comparative Analysis* (DHEW Publication No. OE72-29 1972) conducted an even more extensive survey of the effects on large cities. The study found that sixteen out of twenty-five representative large city school systems had above average assessed valuations, and that sixteen out of twenty-five also had average or below average tax rates for education.

That study also found that if all school systems in the respective states collected all presently collected local funds for education and re-distributed them on a equal funds per-pupil basis, only 29 of the 84 urban school systems studied would receive more funds. If the distribution were made not on a equal dollars per-pupil basis but on an equalization basis rewarding areas with low property values, the results for the large cities would have been even more disastrous.

Indeed, one cannot view without wonder the extent to which ideology has triumphed over good sense in the work of some of the defenders of the *Rodriguez* doctrine. An especially spectacular example of this tendency is found in the recommendations of the Report of the New York State Commission on the Quality Costs and Financing of Elementary and Secondary Education. That Commission recommended a shift from the present mode of financing to a regime in which state property taxes would supply all educational funds, the funds to be re-distributed on a per-pupil basis modified by factors designed to channel more funds to large cities. Under its recommendations

a uniform state property tax of $2.04 per hundred dollars would be imposed for educational purposes. The present tax rate in New York City for education is $1.89, in Buffalo $1.44, in Albany $1.77, in Syracuse $1.66, in Rochester $1.72 and in Yonkers $1.74. The "big six" cities in New York would be presented by this "reform" measure with massive increases in property taxes. By contrast, sweeping reductions would be mandated for those suburban areas now making high tax efforts on education. The tax effort for education in Scarsdale would drop from $2.58 to $2.04, in Hempstead from $2.61 to $2.04, in New Rochelle from $2.49 to $2.04 and so on. *Id.* at p. 2.33.*

Against this background it is scarcely a source of wonder that disenchantment with the *Serrano-Rodriguez* doctrine has set in. Thus, William L. Taylor, former staff director of the United States Civil Rights Commission and now director of the Center for National Policy Review, Catholic University Law School has testified:

> "In the first place, it is being discovered rather belatedly that in some areas there is no correlation between the property wealth of an area and the wealth of families who reside there. This means that in New York City which has a good tax base and many poor families, poor and minority children would be hurt — not helped — by an application of the *Serrano* principle re-distributing property wealth for school financing purposes. Second, the *Serrano* decision points not toward a system of financing based on educational need — which is what poor children really require — or even to equal expenditures, but simply to equalizing the property tax base. Third, even in the best

* See the critical lead editorial in the New York Times for January 29, 1972, and see Buder, *City Tax Rise Linked to Fleischmann Proposals* and Maeroff, *Suburban School Officials Fear Effect of a Freeze on Spending,* New York Times, February 2, 1972 at 47.

of circumstances, there is no persuasive evidence that differences in expenditures — unless they are massive — produce significant differences in educational outcome. It is highly problematical that increases in expenditure alone will produce for poor children the higher quality teaching they so desperately need." (Mondale Committee Hearings page 10472).

The kindest thing that Mr. Taylor could think of to say about the *Rodriguez* doctrine was that "it will strip away one rationale that affluent suburban communities employ for refusing to provide shelter for poor and minority families from the central city," surely a minor and remote consequence.

Mr. Norman J. Chachkin of the NAACP Legal Defense and Educational Fund, a supporter of metropolitanization of school districts, has observed:

> "Some of the schemes proposed in the wake of the California decision could make the cure worse than the ailment. Many school districts — particularly urban districts — could get less money under a revised aid scheme than they get now. The failure of the *Serrano* litigants and court, in their haste to avoid the *McInnis* problem of defining educational need, to propose acceptable remedies puts the burden on state legislatures.
>
> I would not be surprised if many respond by abolishing the flat grant, minimum foundation and all categorical aid programs, equalizing effective assessment ratios, levying and collecting a uniform property tax on a statewide basis, and then distributing to the existing school district structures on a equal dollars per-pupil basis. Not only will this be extremely bad for the education of minority and disadvantaged children, but I wonder how such a restricted revenue base might affect a school district which had in the past negotiated contracts with an affiliate calling for higher than average teachers' salaries." (Mondale Committee Hearings, at 10905.)

To similar effect see Myers, *Second Thoughts on the Serrano Case*, City: The Magazine of the National Urban Coalition, Volume V, Number 6 (Winter 1971), at page 38; Bassett, *Leaders of Urban Schools Oppose Dollar-A-Scholar*, Baltimore News-American, March 16, 1972, page 1, column 4; Goldstein, *supra*, 120 University of Pennsylvania Law Review 504, 526 (1972).

Nor is the probable detriment to large cities resulting from the *Rodriguez* rule a function of the fact that the rule applies only to property tax bases:

> "An equalization principle that operated beyond the sphere of property tax base wealth could work against the cities in another area. Local non-property taxes, though limited in significance to a few states * * * may also disproportionately favor urban centers. In a study of Alabama, Kentucky, Louisiana, Maryland, New York, Pennsylvania and Tennessee for 1968-1969, school districts were classified into central city, suburban, independent city and rural districts. It was found that in five of the seven states * * * the rural districts received the least amount of revenue per-pupil from such local non-property taxes; in four of the seven states * * * the central city districts received the most revenue per-pupil. The average ranking for the seven states showed that the central city school districts on the average received the most revenue per-pupil from local non-property taxes, followed in order by suburban, independent city, and rural districts." *Alternative Programs for Financing Education* 186-187 (1971) (National Educational Finance Project, Volume V). Goldstein, *supra*, at 526 note 73.

Not only will large cities not benefit from *Rodriguez* but it has also been established that minority groups will not benefit from the *Rodriguez* rule. Though the United States Civil Rights Commission has claimed that some moderate benefit would accrue to Mexican-American children in

Texas, its studies of the school systems of California, Arizona, New Mexico and Colorado, conspicuously failed to find any detriment to Mexican-Americans from operation of the existing system of school finance. Similarly, Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 108, 120 note 37, observe:

> "The racial district wealth pattern may be other than intuition might suggest. In California, over half the minority pupils reside in districts above the average in assessed valuation per pupil."

Professor Coons and his colleagues have noted:

> "If racial discrimination were measured by the percentage of all minority students who reside in districts below the statewide median average valuation per-pupil, California would manifest inverse discrimination. 59% (683,919) of minority students live in districts above the median average valuation per-pupil. The percentage is considerably higher for Negroes; Indians and those with Spanish surnames are nearly evenly divided above and below the median. The minority figures were taken from an unpublished survey for the State Department of Education by F. R. Gunsky, 'Racial and Ethnic Distribution of Public School Pupils, District Report, October 1968.' The average valuations per-pupil are from California Public Schools Selected Statistics, 1967-68 (Sacramento)." Coons, Clune and Sugarman, *Private Wealth and Public Education* at 356 note 47.

The disenchantment of large cities with the *Serrano* rule is dramatized by the case of San Francisco which initially filed an Amicus Curiae Brief in support of the plaintiffs in *Serrano*, see Myers, *supra*. More recently, we are told, "San Francisco has joined several of the small wealthy districts to organize a lobby ('Schools for Sound Finance') to fight any limits on local expenditures" in connection with the

legislative consideration of school finance revisions in California. Anderson, *Financing Schools: Search for Reform*, Washington Post, May 31, 1972.

The obvious detriment to large cities inherent in the *Rodriguez* rule has driven apologists for the formula to suggest ever more desperate rationalizations. Thus, it has been suggested that the detriment to large cities might be in part mitigated by adopting a rule requiring not equal dollar spending but equal facilities, thus partially taking account of higher city costs. But the almost total unjusticiability and unenforceability of such a rule, which invariably draws the court into comparison of apples and oranges should be apparent. Other commentators have suggested that the solution is to be found in some formula, legislatively rather than judicially adopted, taking account of the factor of municipal overburden. The difficulty with such a suggestion is that "the National Educational Finance Project reached a different conclusion after analysis of a sample of school districts from eight states: 'no persuasive evidence of the existence of municipal overburden was uncovered.' Johns, et al., *Alternative Programs of Financing Education* 98 (1971)." Dimond, *supra*, 2 Yale Review of Law and Social Action 140, note 38 (1971).

Finally, there have been suggestions that although an unmodified *Rodriguez* rule may be detrimental to cities, the effect of *Rodriguez* type decisions is to induce states to re-examine their systems of school finance; it is inferred that such a re-examination can only result in benefit to cities. However, the history of recent and frequent amendments to state school finance formulas makes clear they have undergone continuous re-examination. As recently pointed out "equal statewide financing will take more money out of the central cities than it will give to them. * * * Under

the Texas decision a state could theoretically choose to appropriate extra funds to deprived urban children. But it would be very difficult for the cities to get those appropriations through any legislature, as a matter of practical politics, in a period in which other wealthy districts were being held down." Editorial, The Washington Post, May 31, 1972.

Indeed, the most dramatic illustration of what the *Rodriguez* principle may mean in practice is supplied by the experience in New Jersey where, in pursuit of the will of the wisp of abstract numerical equalization in favor of small rural districts not really needing additional funds, a state court judge invalidated a new and progressive piece of reform legislation, the Bateman Act, which specifically addressed the problems of large cities by allocating available funds in heavy proportion to districts with large numbers of AFDC recipients.

There is no way a constitutional rule can readily take account of these problems. It has been demonstrated that the *Rodriguez* rule in general, would operate to the severe detriment of urban districts:

> "A decision by the United States Supreme Court attempting to differentiate among the states, would be entirely inappropriate. It would be most unwise to have basically similar state systems held invalid or valid depending on where the state's poor lived, or more accurately, depending on judges' views of the difficult statistical analysis demonstrating a correlation between poor people and poor school districts." Goldstein, *supra*, at 525.*

* Professor Goldstein also accurately observes: "Whatever correlation there is between the percentage of minority people and the tax base wealth of a school district in Texas may reflect the rural nature of Texas minority life or some other state peculiarity." *Id.* at 525 note 71.

Even if it is assumed that the changes adopted by state legislatures following invalidation of existing formulas gave some weight to problems of the cities, the net result would still be grave detriment to the long term interests of the deprived residents of cities. This is so because even the most sanguine exponents of the *Rodriguez* rule acknowledge that vast additional appropriations for education would be necessary to elevate districts to the level of the higher districts in each state and that the larger part of such appropriations would be channeled to districts without particularly pressing educational problems. Whatever marginal benefits might accrue to large cities from changes in educational spending patterns viewed alone would be more than offset by the waste of society's total resources and the detriment in the capacity of government to address other problems such as the urban unemployment which the Coleman Report and its defenders view as the gravest detriment to the educational and other interests of urban children. Thus, even one of the proponents of the *Rodriguez* principle, Professor Charles S. Benson has observed:

> "Assuming compliance with the dictum of *Serrano v. Priest* that wealth not influence quality of education within the states, one is led to the conclusion that state governments must allocate additional revenues to the public schools simply to establish such compliance. To remove the influence of wealth on education requires that expenditures in the large number of low wealth — low expenditure districts be brought up to acceptable standards. This can only be done by injecting money from a higher level of government into those districts. (No one can imagine that states could obtain compliance with *Serrano v. Priest* by forcing high wealth, high expenditure districts to reduce their expenditures sharply, one reason being that most of these expenditures are contractual in nature.) My concern

is that state governments which are obliged to raise their education budget for this purpose of compliance will slight other social welfare activities, such as health, low cost housing, and the more developmental types of welfare accounts. There is strong reason to believe that performance of schools with respect to disadvantaged youth is itself extremely sensitive to these very kinds of expenditures that might suffer as states move toward compliance with Serrano. This would subvert whatever equalitarian purpose exists in *Serrano* * * *". (Mondale Committee Hearings at 7669).

Similar concerns underlie the conclusion of a recent careful study of the history of state educational finance formulas:

"Improving the condition of large city school systems can best be attained by a pinpointed federal program that will deal with financing needs of the large cities and other areas containing the concentrations of poverty which are so costly to local governments, both in the educational and non-educational spheres. The financial requirements of suburban and rural school systems can be most adequately dealt with by the system of state and local finance which has been able to provide such large sums of money since the end of World War II. Large cities, on the other hand, present problems which are very different and probably can be dealt with only on a national scale with a national resource base." Sacks, *City Schools, Suburban Schools: A History of Fiscal Conflict* (1972) at 177.*

* Indeed, the limited federal and state programs focused on deprived urban areas are said to have already placed city high schools with large numbers of low-income children on a much better than average material footing. See Havighurst, et al. *A Profile of the Large-City High School,* National Association of Secondary School Principals, November 1970, quoted at Mosteller and Moynihan, *On Equality of Educational Opportunity* (1972), pg. 11.

Plaintiffs, though claiming to represent all parents, children and taxpayers in their state, seek a rule profoundly destructive of their political rights. As to the rural districts in Texas and elsewhere in the country, local budgetary control over educational expenditures and a tradition of close accountability of school officials would be ended. As to urban areas, a process of political evolution which over the course of a century has given varying racial and ethnic groups, in Texas and in the large cities of the East and Midwest, a voice in fiscal control of their educational systems would be brought to an end and further shifts in influence over City educational policy precluded.

Finally, it has further been noted that "the variations in school expenditures per pupil, throughout the country, are mainly due to the differences in teachers' salary scales. The high salary scales are commonly protected by formal contracts between school boards and teachers' organizations. As a practical matter, in view of the political strength of the teachers' organizations, it is idle to suppose that salaries in the high-cost school systems can be cut or, following one proposal, can be frozen over a period of years while other systems gradually catch up. The alternative would be to equalize costs by increasing class sizes in high-budget areas. Here again the effects would be sharpest in the central cities, where the need for low pupil-teacher ratios is greatest." Editorial, The Washington Post, May 31, 1972.

COSTS OF THE RELIEF SOUGHT

The relief sought by Plaintiffs will result in staggering costs to already heavily burdened state governments. The President's Commission on School Finance estimated the cost of elevating all school districts to the level of the

ninetieth percentile in each state at 6.2 billion dollars and the cost of elevating all school districts to the ninety-fifth percentile in each state at 8.8 billion dollars. Since the larger part of school budgets consists of contractually obligated items such as teachers' salaries, bonds, contracts for pupil transportation and the like, it is unlikely that as a practical matter any state would find it possible to equalize at less than the ninety-fifth percentile. See the summary of the findings at Nation's Schools, May 1972, page 8 and see Staff Report, President's Commission on School Finance, *Review of Existing State School Finance Programs*. These additional outlays are, of course, in addition to the rapidly rising ordinary level of expenditures with which state governments must keep abreast. The rate of increase in educational expenditures in recent years has far outstripped the rate of inflation and the rate of growth of the revenue resources of state governments. Thus, on a national basis, taxation and appropriation for public school systems increased by 67.4% between 1957-58 and 1963-64, see Advisory Commission on Inter-Governmental Relations, *State Aid to Local Government* (1969) at 56 (Mondale Committee Hearings at 8480). Similarly, state and local revenue receipts from own sources for public schools as a percentage of state personal income increased from 3.1% in 1957-58 to 4.6% in 1967-68. *Id.* The increasing militancy of teachers' unions suggests that this burden upon state governments is likely, if anything, to accelerate in its dimensions in the next several years. The present suits would saddle the states with the responsibility not merely of keeping abreast of ordinary demands for ever-increasing revenues, but also of finding the vast additional sums mentioned. Just how a burden of 6.2 billion or 8.8 billion dollars per year upon the hard pressed state governments can be described as anything

other than overwhelming is difficult to discern, given the fact that the pending revenue-sharing bill over which there has been so much travail will give state and local governments together only 5 billion dollars per year or roughly 5/9ths of the added burden which plaintiffs here would thrust upon them in a period of rising public demand for other governmental functions.

Some inkling of the burden which would be imposed upon particular states may be gleaned by comparing the sums necessary to raise school expenditures in given states to the ninetieth percentile now prevailing in those states with the revenues which would be generated from a 1% percent increase in existing sales taxes. The comparison for the eighteen states which would be most heavily burdened in absolute terms by the *Rodriguez* rule is as follows:

	Revenues per 1% of Sales Tax Rate, Present Taxes, 1969 (National Educational Project, Vol. 2, pp. 307-08).	*Total Expenditures to Raise to 90th Percentile (President's Commission on School Finance)* Compact, *April 1972, pg. 25*
California	$421,000,000	$731,200,000
Connecticut	50,000,000	126,800,000
Florida	143,000,000	117,200,000
Georgia	103,000,000	162,600,000
Illinois	234,000,000	401,600,000
Indiana	100,000,000	112,900,000
Maryland	66,000,000	175,200,000
Massachusetts	53,000,000	236,000,000
Michigan	199,000,000	326,600,000
Minnesota	58,000,000	107,200,000
Missouri	99,000,000	107,100,000
New Jersey	88,000,000	285,600,000
New York	350,000,000	537,700,000
Ohio	155,000,000	471,800,000
Pennsylvania	148,000,000	456,800,000
Texas	179,000,000	263,400,000
Virginia	70,000,000	130,800,000
Washington	94,000,000	107,800,000
U.S. as whole	$3,790,000,000	$6,200,000,000 (est.)

Similar comparisons with respect to income and property taxes may be made by recourse to the figures contained in the study of the National Educational Finance Project above cited. It is clear that the order of magnitude of the increases which will be required will be such as to totally preempt for a number of years one or more of the principal revenue sources in almost every state in the union and to render impractical tax increases or substantial budget increases for any other public purpose.

As elsewhere noted in this memorandum, no particularly useful public purpose would be served by this massive

effort. In Maryland, for example, less than ¼th of the total additional funds necessary would go to the City of Baltimore; the overwhelming proportion of it would be channelled to rural districts lacking pressing educational needs and the same is true elsewhere in the country. The chief, if not the only, beneficiaries of this massive disruption would be teachers' organizations which would swiftly organize on the state level to obtain the maximum portion of the newly appropriated revenues.

The interference with state and local budgeting which imposition of the *Rodriguez* rule would produce would be total. As Professor Coons and his colleagues have noted:

> "The adoption of a power equalized school district system would have analogous but more complex effects on other public services. * * * Power equalizing would alter the price of education for nearly all districts and the interdependencies of local services would assert themselves in contrasting ways. That is, this all would happen unless the state either mandated or assumed the cost of other services beside education. In fact, there are certain to be pressures toward such comprehensive fiscal neutrality. The *Serrano* idea will increase sensitivity to abuses in respect to other public services which have been long endured because of their apparent inevitablity; this dissatisfaction will be further stimulated by economists and politicians, some of whom will promote full state assumption of all services and others whom will argue for power equalizing these same functions." Coons, Clune and Sugarman, *A First Appraisal of Serrano*, 2 Yale Review of Law and Social Action 111 at 119 (1972).

Professor Dimond has similarly noted:

> "I have not the vaguest notion of what the effect of fiscal neutrality in school finance alone will be on other public taxing and spending and private consumption and saving. I only know that Coons, et al., bear a high

burden of proof that it is possible to tinker with 'just' the public school finance scheme. I suspect that requiring reform of public school finance systems will have a considerable impact on the patterns of all other public and private systems of raising and spending money. Those disinclined by philosophy to judicial intervention will be immensely troubled by that specter, and especially by its unknown contours."

Professor Yudof and Kirp have likewise noted:

"The *Serrano* decision does of course have an impact on the legislature's capacity to set fiscal policy. If the legislature is prodded by a *Serrano* like suit to increase state education appropriations (a likely response), then the state will be obliged either to increase state taxing, or to cut back some other state supported program. *Serrano*, to put the point differently, imposes constraints on the legislatures' ability to trade off expenditures on public goods." 2 Yale Journal of Law and Social Action at 147, note 4.

Nor is there any reason to believe that the principles of *Rodriguez* will be limited in their impact to state programs. Rather it is clear that every federal matching program will be potentially jeopardized by the decision, since almost by definition the ability of states to put up state funds to be matched is a function in some measure of their wealth.

It should be noted that this spelling out of the potential implications of *Rodriguez* is not a parade of horribles devised by counsel opposing application of that decision; it comes from the lips of the proponents of the doctrine themselves.

See also Schoettle, *The Equal Protection Clause in Public Education*, 71 Columbia Law Review 1355 (1971), noting the potential implications for the total budgeting process.

There is indeed no reason to believe that these opportunities will not be eagerly pursued once the door is open to lawsuits of this character attacking state and federal taxing and spending programs. We have been told:

> "*Serrano* 'opens a very large door' says John Silard, a Washington, D.C., attorney involved in school tax litigation. For the first time, he says, the courts are requiring 'equal protection' in public programs. They are holding states accountable for how and where they spend public money. In his view, this means 'a revolution in public services', the schools, he predicts, are merely 'the first bite at the big apple. Welfare obviously comes next, and I guess health too.' * * * Some lawyers predict that if education is accepted as a fundamental interest, other public services are bound to follow. But they don't like to say it out loud. 'They want this to stick', one attorney says. 'You stress that education isn't like garbage. We are playing a game here. You have to (in order) not to frighten the courts away from a proposition that's sound'." Andrews, *Tax 'Revolution'*, Wall Street Journal, March 13, 1972, pages 1, 12.

The effective inseparability and indistinguishability of education from other services was noted by Judge Harvey in his decision in *Parker v. Mandel*, which repeatedly refers to "health, education and welfare" in declining to apply the *Serrano-Rodriguez* doctrine.

It will be recalled that the California Supreme Court felt obligated to issue a supplemental opinion when it was discovered that its initial edict was having an adverse effect upon state property tax collections. With the doctrine that plaintiffs propose the legitimacy of virtually all state taxation will be cast in peril in the eyes of many members of the public and the eyes also of at least the more exuberant members of the lower federal judiciary. Professors Coons,

Clune and Sugarman have gleefully pointed to the factors which they hope will induce legislative acquiescence in their favored doctrine:

> "A prolonged period of turmoil and doubt in which aid formulas, validity of tax impositions, validity of bonds and retroactivity remain locked in a political struggle." 2 Yale Review of Law and Social Action at 118.

Surely, whatever their applicability in their original context, there is merit in this new context in the cautionary words of Judge Learned Hand on the duty of deference to the decisions of legislatures:

> "These men [Justices Holmes and Cardozo] believed that democracy was a political contrivance by which the group conflicts inevitable in all society should find a relatively harmless outlet in the give and take of legislative compromise after the contending groups had had a chance to measure their relative strength; and through which the bitterest animosities might at least be assuaged, even though the reconciliation did not ensue which sometimes follows upon an open fight. They had no illusion that the outcome would necessarily be the best attainable, certainly not that which they might themselves have personally chosen; but the political stability of such a system and the possible enlightenment which the battle itself might bring, were worth the price. * * * We face difficulties which are big with portent and uncertain of solution. Such solutions as will arrive, like all human solutions, will be likely to be inadequate and unfair placebos. But nevertheless they will be compromises, as government almost always must be in a free country; and if they are to be upset under cover of * * * majestic sententiousness, they are likely to become centers of frictions undreamed of by those who avail themselves of this facile opportunity to enforce their will." Learned

Hand, *Chief Justice Stone's Concept of the Judicial Function*, Dilliard (editor), *The Spirit of Liberty* at 204, 207.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Liebmann, one of the attorneys for Amici Curiae Montgomery County, Maryland, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 21, 1972, I served copies of the foregoing Amici Curiae Brief on the Appellees and Appellants by depositing such copies in the United States Mail, postage prepaid, and addressed to the attorneys of record for Appellees and Appellants as follows: Arthur Gochman, Esquire, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, Mario Obledo, Esquire, 145 9th Street, San Francisco, California 94103, Counsel for Appellees. Pat Bailey, Esquire, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, Charles Alan Wright, Esquire, 2500 Red River Street, Austin, Texas 78705, Counsel for Appellants.

.....

George W. Liebmann

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

vs.

DEMETRIO P. RODRIGUEZ, et al., *Appellees.*

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF WILSON RILES, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA STATE BOARD OF EDUCATION.

Wilson Riles, Superintendent of Public Instruction of the State of California, and the California State Board of Education, hereby respectively move for leave to file the attached brief amici curiae in this case. The attorney for the appellees has no objection to the filing of the attached brief. The consent of the attorney for the appellants was requested but refused.

The interest of the California Superintendent of Public Instruction in this case arises from the fact he is a party in the case of *Serrano v. Priest* (Los Angeles Superior Court No. C-938254) which matter is pending trial in the California Superior Court, upon remand from the California Supreme Court, *Serrano v. Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971). In the present matter the court below relied heavily upon the decision of the California court in *Serrano v. Priest,* supra. The outcome of the *Serrano* case will probably be determined by the court's decision in the present matter. Other parties in *Serrano* have filed amici briefs in this matter.

Amici are responsible on the statewide level for the administration of the California system of public instruction. The court's decision in this matter may shape tax reform and alter educational finance in the states for some time to come. Amici therefore are vitally concerned that the decision of the court in this matter be consistent with sound and realistic educational practice and philosophy. Amici feel they are particularly qualified to file argument on the issue of the imposition of a judicially manageable standard relative to a school financing system found to be in violation of the Fourteenth Amendment.

Dated, Sacramento, California,
August 15, 1972.

Respectfully submitted,

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BRIEF AMICI CURIAE OF WILSON RILES, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF CALIFORNIA, AND THE CALIFORNIA STATE BOARD OF EDUCATION.

INTEREST OF AMICI CURIAE

Wilson Riles

Dr. Wilson Riles, as Superintendent of Public Instruction of the State of California, is the only California education official who is a state-wide elective officer. California Constitution, Article IX, Section 2. The California Legislature has delegated to the Superintendent the function of administering the

California State Department of Education and the duty of superintending California public schools. California Education Code Sections 253, 351-354. In addition, he is responsible for administering and regulating numerous specific programs dealing with every aspect of education as authorized by statutes codified in the voluminous California Education Code. He is responsible for apportioning funds from the State School Fund to school districts and county superintendents of schools. California Education Code Sections 17401, et seq.

The Superintendent of Public Instruction is a party in *Serrano v. Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971), now pending in the Los Angeles Superior Court, Action No. 938254. The course the trial will take in that case will be largely influenced and dictated by the decision of the court in the instant matter.

California State Board of Education

The California State Board of Education is composed of ten members appointed by the Governor with the advice and consent of 2/3 of the California Senate. California Education Code Section 101. The State Board of Education is similarly charged with administering California public school programs by virtue of hundreds of specific California Education Code sections making provision therefor. In addition, the State Board of Education "shall study the educational conditions and needs of the State. It shall make plans for the improvement of the administration and efficiency of the public schools of the state." Cali-

fornia Education Code Section 153. California Education Code Section 152 requires the State Board of Education, among other things, to adopt rules and regulations "for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the State, and . . . for the government of such other schools, excepting the University of California and the California State Colleges, as may receive in whole or in part financial support from the State."

At its meeting on June 9, 1972, the State Board of Education unanimously authorized the filing of an Amicus brief in this matter.

The major objective of the Superintendent of Public Instruction and the State Board of Education is the establishment and maintenance of quality education and equal education opportunities for all the pupils of the State of California and for that reason they have a special interest in the outcome of the instant case.

SUMMARY OF ARGUMENT

1. The fundamental interest involved in this matter is an interest of people in quality education. Children have suffered injury as a result of Texas' choice to dispense public education according to the wealth of its state-created school districts. Classification by wealth is constitutionally suspect under the Equal Protection Clause. Where, as here, the interest considered is fundamental to a free society, such classifi-

cation constitutes a demonstrable violation of equal protection. The State has not here demonstrated discrimination by wealth is necessary to advance a compelling interest. The interest in local choice of school spending can be better served by permitting local effort rather than local wealth to determine spending. The Texas laws under consideration are invalid under the Equal Protection Clause under any standard of review the Court may apply. The constitutional standard of "fiscal neutrality" formulated by the Court below will not adversely affect other societal interests, e.g., of parents in providing for the education of their children, local community control over school matters, legislative efforts to provide alternatives in attempting to improve public education. Amici are convinced that the holding below will not impose a "straitjacket" upon governmental units but will free the legislative and executive branches to devote their efforts to improving the system of public instruction, to create meaningful alternatives in public education, and to make available local options in the operation of public school systems.

2. It is recognized that no decision of the Supreme Court has held that education is a fundamental interest of the type requiring the application of the strict scrutiny test in determining the validity of legislative classifications, including a classification based on substantial disparities in wealth such as a school finance system. The standard the Court is now being urged to apply is that employed in *Brown v. Board of Education,* 347 U.S. 483 (1954), that when a state

has imposed a system of compulsory education, then a denial by the State of equal education opportunity to some children subject to the State's system of public instruction violates the Equal Protection Clause of the Fourteenth Amendment; that in the present context, the effect that a public school finance system has on the Equal Protection Clause, the discrimination, or denial of an equal education, is clearly demonstrated by an examination of the effects of such financing system, i.e., substantial unequal allocations of funds resulting in discrimination against poor children and children living in poor school districts. This discrimination based on wealth affects a vital interest, education of children. The confluence of these elements: discrimination based on wealth, the importance of education to the individual and society, the denial of an equal education to children where a state mandates the establishment of a system of public education and compels the attendance of children at its schools, provides the court with a unique opportunity to apply a constitutional test heretofore reserved for other basic rights (e.g. voting) and suspect classifications (e.g. race), to a school funding scheme that invidiously discriminates against children.

ARGUMENT

I

STATE SCHOOL FINANCE SYSTEMS DISCRIMINATE AGAINST CHILDREN LIVING IN POOR SCHOOL DISTRICTS

The court below found that the system by which the State of Texas provides for the financing of public elementary and secondary schools discriminates on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes. The three-judge decision in this matter, 337 Fed. Supp. 280 (1971), amply developed the factual framework for its findings by reviewing the Texas school finance system and by enumerating the statistical data forming the basis for its conclusion. It cannot be disputed but that substantial disparities exist among Texas school districts in school revenue and in spending per pupil according to the wealth of each school district.

Serrano v. Priest, 5 Cal. 3d 584, 487 P. 2d 1241 (1971), holding the California system of public school financing violates the Equal Protection Clause of the Fourteenth Amendment, contains a detailed discussion of the California financing scheme. The California court's analysis exposes the gross inequalities of a state mandated system that results in expenditures per pupil ranging from $407 to $2,586, for instance, in elementary school districts in California: See Coons, Clune, and Sugarman, *Private Wealth and Public Education,* 96-148 (Harvard University Press, Cambridge, 1970), for an analysis of financing systems in other states.

II

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBITS MAKING THE QUALITY OF A CHILD'S EDUCATION A FUNCTION OF THE WEALTH OF HIS SCHOOL DISTRICT

A threshold question facing the court in its resolution of this matter concerns the proper constitutional test to be applied in judging plaintiffs' assertion of a violation of the Equal Protection Clause. Certain legislative classifications impinge upon fundamental interests or involve suspect classifications and thus are subject to a "compelling interest" or "strict scrutiny" standard requiring the State to demonstrate that the legislation is necessary to promote a compelling state interest. *Shapiro v. Thompson,* 394 U.S. 618 (1969). Legislation not involving such interests or classifications is said to be subject to a "reasonable basis" or "rational basis" test providing in essence that legislation alleged to be in violation of the Equal Protection Clause is presumed valid with the burden of establishing otherwise on the party challenging the legislation. *Dandridge v. Williams,* 397 U.S. 471 (1970).

1. Education is fundamental and specially protected by the equal protection clause.

When the court, in *Brown v. Board of Education,* 347 U.S. 483 (1954) invalidated state-imposed segregation by race in public schools, it expressed itself at length on the development of public education and its current place in American life. The court felt that "only in this way can it be determined if segregation

in public schools deprives these plaintiffs of the equal protection of the laws." (at page 493).

In *Brown* the court's examination into the issue of equal education opportunity, although involving a suspect classification based on race, appeared to be necessary to the resolution of the controversy presented in that case. The court's conclusion as to the fundamental importance of education resulted in the Court invalidating a state-imposed system of segregation.

In approaching the problem presented by the instant case, the court is again confronted with the Equal Protection Clause as it is related to equal education opportunity. The discrimination involved in the present matter, however, is more sophisticated and subtle in that it relates to a school financing system rather than to a classification based on race. The present discrimination is at least as pervasive in its resultant effect of state mandated unequal treatment and perhaps lends itself to more readily discernible measurements of unequal protection. If in *Brown* it was shown that the state spent $200 per child for the education of each black child in segregated schools and $1,200 per child for the education of each white child in separate schools, the Constitution would have been violated even under the separate but equal doctrine. Under the Texas and the California school finance structures, there exists the anomaly that many black children are not receiving an education equal to that which would have been provided them under the separate but equal doctrine. It could hardly have

been the intent of the court in *Brown,* by holding that racially separate schools are unequal as a matter of law, to foreclose the principle now urged: That state imposed discrimination, based upon wealth rather than race, resulting in unequal educational opportunities for public school children, is a denial of equal protection in the absence of a compelling state interest justifying such discrimination.

It is submitted that the expression of the court in *Brown* is the most eloquent argument yet rendered on the question whether equal education opportunity is a fundamental interest warranting the protection of the Fourteenth Amendment. The court in *Brown* declared that:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The language in *Brown* that the opportunity to an education "where the state has undertaken to provide it, *is a right which must be made available to all on equal terms*", (emphasis added) epitomizes the principle the court is now urged to renew. The principle involved in this case is the same; the application of that principle to a broader set of circumstances is valid when measured by the invidious nature of the discrimination and the appropriate standard available to remedy the wrong. (See Part III, infra.) Critics have attempted to obscure what this case is all about. That is, when a state mandates a system whereby one child receives a $1,500 education and another child is relegated to a $400 education, the opportunity for an education is being abridged with respect to the latter child; the state is manifestly not providing the opportunity for an education to all on equal terms.

To reject the strict scrutiny standard in this case because the discrimination applies to some black children and some white children (and other racial groups) rather than black children only is to conceptualize a difference without logic or rationale in that such doctrine would signal a retreat from the Court's pronouncement in *Brown* by sanctioning as constitutionally permissible discrimination prohibiting a child from the opportunity of obtaining his full intellectual capacity and exercising his obligations as a citizen.

As recently as May, 1972, the court in discussing education in the context of a state's interest in the education of its citizens as reflected through its com-

pulsory education laws, as opposed to the First Amendment guarantee of religious freedom, stated that "Providing public schools ranks at the very apex of the function of a state." *Wisconsin v. Yoder,* 40 U.S. Law Week 4476. In *Yoder* the court felt education was subject only to its effect *"on other fundamental rights and interests",* such as first amendment guarantees (emphasis added).

An exhaustive analysis of the unique role education plays in our society and its impact on the individual child is found elsewhere; it is unnecessary to repeat that education is clearly distinguishable from other governmental services. *Serrano v. Priest,* 5 Cal. 3d 584, 487 P. 2d 1241 (1971); Coons, Clune, and Sugarman, Educational Opportunity: *A Workable Constitutional Test for State Financial Structures* (1969) 57 Cal. Law Rev. 305.

The cries of the alarmists that the doctrine set forth herein would lead to all governmental services being classified as fundamental has been dispelled by state and federal courts considering this issue. *Van Dusartz v. Hatfield,* 334 Fed. Supp. 870 (D. Minn. 1971); *Serrano v. Priest,* supra; *Robinson v. Cahill,* 118 N.J. Super. 223, 287 A. 2d 187 (1972) and by the three judge district court opinion reported in this matter in 337 F. Supp. 280 (1971).

2. Discrimination against children by wealth is constitutionally suspect.

The court has repeatedly declared that classifications based upon wealth are suspect under the Equal Pro-

tection Clause. *Harper v. Virginia,* 383 U.S. 663 (1966); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969).

The variations in wealth among individual school districts are a product of governmental action in that school funding schemes are mandated in detail by state constitutions and statutes. The California Supreme Court in *Serrano* stated the effect of such a governmental classification based upon wealth in the following language:

> "Obviously, the richer district is favored when it can provide the same educational quality for its children with less tax effort. Furthermore, as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. (Legislative Analyst, Part V, *Supra,* pp. 8-9.) Thus, affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all." (pp. 599-600.)

Some claim that the discrimination inherent in the Texas school finance system is against taxpayers and not children. Amici's interest in school finance is based solely on the result of tax dollars, i.e., the benefits to be derived therefrom by children. The injury resulting from the present Texas and California school finance systems is a real one: It is the discriminatory effect of such legislation upon the interest of children in receiving an education.

3. Quality of education is related to the cost of education.

The fact that grossly different amounts of money are being expended per pupil is sufficient to establish a violation of the Equal Protection Clause without the necessity of factually proving a correlation between dollars spent and the quality of educational opportunity provided by the State. The court in *Van Dusartz,* supra, summarized this principle as follows:

> "In any event, the Legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending; it would be high irony for the state to argue that large portions of the educational budget authorized by law in effect are thrown away. . . .
>
> * * * * *
>
> "While the correlation between expenditure per pupil and the quality of education may be open to argument, the court must assume here that it is high. To do otherwise would be to hold that in those wealthy districts where the per pupil expenditure is higher than some real or imaginary norm, the school boards are merely wasting the taxpayers' money. The court is not willing to so hold, absent some strong evidence. Even those who staunchly advocate that the disparities here complained of are the result of local control and that such control and taxation with the resulting inequality should be maintained would not be willing to concede that such local autonomy results in waste or inefficiency." (*Van Dusartz v. Hatfield,* supra, p. 873.)

Robinson v. Cahill, 287 A. 2d 187, 199-205, contains an extensive discussion of the various studies

and statistics indicating a high degree of correlation between expenditures for education and the quality of education. The court in *Robinson* concludes, at page 203, that "better education does make a difference regardless of the child's social environment."

Statistics compiled by the California State Department of Education indicate a positive correlation between achievement and expenditure per pupil. The statistics indicate the magnitude of difference, or index of difference, in achievement test scores is so great that it is impossible for such difference to have occurred by chance or some other random factor. The statistics involved 60% of all unified school districts in California, the top 30% of such districts in per pupil expenditure as compared with the lowest 30% of such districts in per pupil expenditure. The comparison between the top 30% (70 districts) and the low 30% (70 districts) reveals that pupils attending districts with high per pupil expenditures have significantly higher achievement test results than pupils attending districts with lower per pupil expenditures. The differential in achievement test scores between such districts is one of three raw scores, a significant difference.

Even if such correlation between tax dollars and quality of education cannot be proven in all cases, e.g., between each school district in a state compared to every other district in that state, the validity of the principle enunciated by the court below remains intact: The right to access to equal funds or "fiscal neutrality" rather than the result of the availability

of funds to a given school district. That better funding is necessary for better education is indisputable, and is not rendered invalid as a result of a particular district mismanaging its funds or allocating expenditures based on improper priorities.

4. A school finance system may be invalid under the rational basis test of equal protection.

Legislation may be judged by the rationality of the relation between the state's objective and the means chosen to effectuate that objective. Under this test the classification employed must be reasonably related to the achievement of its objectives. *McGowan v. Maryland,* 336 U.S. 420 (1961); *Dandridge v. Williams,* 397 U.S. 471 (1970).

An objective of a state-wide system of public education cannot be achieved when it is funded by substantial disparities of local wealth. The court below specifically stated that defendants "fail even to establish a reasonable basis for these classifications." (at page 284).

The California School Finance System was designed to "strengthen and encourage local responsibility for public education" (California Education Code Section 17300). Section 17300 refers to local control as requiring "that all local administrative units contribute to the support of school budgets in proportion to their respective abilities." The court's comment in *Serrano v. Priest,* supra., relative to the relationship of the legislative objective to the California financing scheme is applicable to the instant case. The court in *Serrano* stated:

"We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts. . . .

"In summary, so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax roll cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option." (at page 611).

III

A JUDICIALLY MANAGEABLE STANDARD IS AVAILABLE TO TEST THE CONSTITUTIONALITY OF A SCHOOL FINANCE SYSTEM.

McInnis v. Shapiro, 293 Fed. Supp. 327, (1968) aff'd mem. sub nom. *McInnis v. Ogilvie,* 394 U.S. 322 (1969), involving a challenge to the Illinois school financing system, held that the lack of judicially manageable standards made that controversy nonjusticiable. In that case plaintiffs contended the Equal Protection Clause required school expenditures to be made on the basis of pupils' educational needs.

Serrano v. Priest, supra, distinguished the holding in *McInnis* by enunciating a different standard: The

quality of a child's education cannot be a function of the wealth of his parents and neighbors.

Van Dusartz, supra, refined the standard as follows: The level of spending for a child's education may not be a function of wealth other than wealth of the state as a whole.

The court below felt the necessity for the development of judicially manageable standards in reviewing a complex school finance system and adopted the principle of "fiscal neutrality" as refined above in *Van Dusartz.* The court below found that "this proposal does not involve the court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the State may adopt the financial scheme desired as long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child." (at page 284). The court further stated that the new form of financing "may be made from a wide variety of financial plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the State as a whole." (at page 285).

Amici are vitally concerned with two aspects of this matter. First, that the judiciary does not intrude upon educational decision-making with respect to questions such as the specific manner in which funds for education should be allocated, or the needs of individual pupils, or groupings of pupils according to classifications such as handicapped or disadvantaged.

Second, that the court does not invalidate a state's prerogative to delegate to local school districts decision-making power over the administration of their schools, including local fiscal control over the amount of funds to be spent on education.

Amici believe that the holding below, in following *Serrano v. Priest,* supra, not only obviates its fears as expressed above, but affirmatively promotes the interests of education by permitting the strengthening of principles of local control, quality education, and equal education opportunity to a degree unsurpassed in the history of American education. The principle of "fiscal neutrality" enunciated by the court below allows local communities, educators, and legislators to cooperate in achieving these often expressed objectives, the fulfillment of which have been heretofore all too often impeded by the intrusion of an inequitable and invalid system of school finance.

It has been contended by others that because the details of a system of taxation and method of financing public schools may involve somewhat complex features foreign to the experience of the judiciary, such matters should be left to the Legislature and to school authorities. The answer to this is two-fold. (1) Amici fully agree that the details of school financing should not be determined by the courts; (2) this court has always acted when the Constitution has been violated. A decision in this matter prohibiting legislative classifications resulting in invidious discrimination would not prevent the legislature from performing its historic role in formulating policy and enacting details

with respect to the system of taxation to be utilized to finance public schools so long as such does not violate the Constitution.

It has also been forecast by others that the truly important governmental interests of local control, experimentation, innovation, funding for special educational problems, democratic values, etc., will be destroyed by decisions such as that rendered below. Amici, as well as most school officials in the United States, respectfully contend otherwise. Such values and interests will be strengthened by affirmance in this matter. Neither the appellant nor amici supporting appellant's position, can state how or in what manner these important interests would be adversely affected by adoption of the equal protection standard found applicable by the court below. It can only be concluded that this is simply because the values inherent in the public school system, along with the ability to plan and implement innovative programs, will not be destroyed or impaired by action of this court in affirming the decision below.

Subsequent to the decision of the California Supreme Court in *Serrano,* the California State Board of Education appointed a school support committee to review the California school finance structure and to make recommendations to the Board that could lead to legislation that would meet the needs of the California public school system and also bring such system within the requirements imposed by *Serrano.* The committee's deliberations resulted in recommendations, meeting the requirements of *Serrano,* which were sub-

sequently submitted to the California Legislature in the form of Assembly Bill 1283 and Senate Bill 1171, 1972 Session of the California Legislature. The committee's recommendations were made without opposition by any member of the committee. Amici feel it important to bring this to the court's attention as an example of the diverse groups and interests that have been able to arrive at a consensus in implementing the holding in *Serrano*. It is contended such could not have occurred if the dire consequences of *Serrano* suggested by its opponents had any validity in fact.

The committee on school support consisted of representatives of four private corporations, Arthur Young and Company, Golden State Mutual Life Insurance Company, SOLAR Division of International Harvester Company, and First California Corporation; a California State Assemblyman, and the following organizations: California State Chamber of Commerce, California Taxpayers Association, League of California Cities, California School Boards Association, California State Department of Finance, California State Controller, League of Women Voters, California Farm Bureau, California State Grange, California County Supervisors Association, NAACP, California Teachers Association, Association of California School Administrators, Northern California Industry-Education Council, California Congress of Parents and Teachers, California Junior College Association, California Association of School Business Officials, Schools for Sound Finance, California Federation of Teachers, and the Association of Mexican-American Educators.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court below should be affirmed.

Dated, Sacramento, California,
August 15, 1972.

Respectfully submitted,

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Attorney for Amici Curiae.

AUG 19 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

Supreme Court, U.S.
FILED
OCT 10 1972
MICHAEL RODAK, JR., CLERK

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

vs.

DEMETRIO P. RODRIGUEZ, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR JOHN SERRANO, JR. AND JOHN ANTHONY SERRANO AS AMICI CURIAE IN SUPPORT OF APPELLEES

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Amici hereby respectfully move for leave to file the attached brief urging affirmance of the decision of the lower court in the above-entitled case. Amici have consent of appellees to the filing of this brief; appellants have refused consent. The interests of amici and their reasons for requesting leave to file the attached brief are as follows:

John Serrano, Jr. and John Anthony Serrano are father and son respectively. The son, age 12, is a

student in the 7th grade in Dexter Junior High in Whittier School District in Los Angeles County, California. For many years, the elder Serrano has striven to secure quality public education for the son and for the younger Serrano children. To this end in 1968 he and his son joined other parents and their children as original plaintiffs in the class action known as *Serrano v. Priest,* 5 Cal.3d 584, 487 P.2d 1241 (1971). That action challenging discrimination by wealth in the California school finance system is still pending before the state courts of California and could be seriously affected by the resolution of the instant appeal. The Serranos and all families in similar circumstances look to this Court for final judgment upon the systems of school finance which have so long visited inferior education upon their children.

Amici have considered the issues of national significance presented in this case. They have concluded that the decision below is constitutionally correct and that the standard therein adopted is judicially manageable. Amici, therefore, respectfully request that this Court grant leave to file the attached brief which focuses upon that standard.

Dated, August 18, 1972.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

VS.

DEMETRIO P. RODRIGUEZ, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR JOHN SERRANO, JR. AND JOHN ANTHONY SERRANO AS AMICI CURIAE IN SUPPORT OF APPELLEES

SUMMARY OF ARGUMENT

Texas school districts vary widely in their taxable resources per pupil and thus in their ability to raise money for education. Texas districts also vary in their level of spending per child. The holding below challenges the impact of the former and not the existence of the latter; spending differences are at stake only insofar as they are linked to district wealth.

Texas has in fact made spending for public education a function of the taxable property wealth per

pupil of its school districts; this is undisputed by appellants. Amici will argue that such state designed wealth classification burdens an interest—education—which is constitutionally fundamental; indeed, this interest significantly affects "freedoms guaranteed by the Bill of Rights". *Dandridge v. Williams,* 397 U.S. 471, 484 (1970). Amici will emphasize that the victims of the consequent wealth discrimination are children and in no sense responsible for their own plight. Their political impotency makes judicial intervention specially appropriate.

Given these circumstances the defendants must demonstrate that discrimination by wealth of the district is necessary to advance a compelling interest of the State. There is, however, no legitimate interest of the State served by the present use of district wealth as a criterion of dollars spent upon a child's education. Even if local control of school taxing and spending were an interest held by the State and were thought to be "compelling", that interest could be served—and served better—by permitting locally chosen tax effort, but not local wealth, to determine spending.

The constitutional standard recognized below is simply that the quality of public education may not be a function of wealth other than the wealth of the State as a whole. As a constitutional rule it is clear, simple, and effective. It forbids nothing which is educationally rational. It permits any degree of interdistrict spending variation based upon specific educational considerations or cost differences or upon local

choice not affected by wealth differences. Practically speaking it offers a way to achieve greater autonomy and variety in local government. It has been well received in disinterested quarters, but, in any event, would be easily enforced without engaging the courts in educational policy making.

Amici regret the length of this brief. It is largely the consequence of the emphasis by defendants and defendants' amici upon the published work of counsel herein. Misinterpretations of this work by defendants' advocates are understandable and unresented. Yet their number and magnitude entail patient clarification of what is, underneath it all, a fairly simple lawsuit.

ARGUMENT

INTRODUCTION:

TEN MISCONCEPTIONS CONCERNING FISCAL NEUTRALITY

The standard adopted below is this: "the quality of education may not be a function of wealth other than the wealth of the state as a whole." 337 F. Supp. at 284. This simple and extremely modest rule of "fiscal neutrality" has been misconstrued both by those who defend the present system and those critics who would have *Rodriguez* support broad egalitarian objectives. A summary correction of the more prominent errors will dispose of false issues and put the appeal in clearer perspective before we proceed:

1. The issue is local control over spending.

This is plainly wrong. Under the holding below the legislature remains free to let districts set their own spending levels, so long as, in the future, district differences in taxable wealth do not affect the outcome. There are many feasible systems that would accomplish this. Local control in fact seems likely to increase.

2. Uniformity of spending among districts is required.

This is incorrect. It would even be proper for Texas to increase the present range of district spending variations. For example, the State validly might decide to spend $5,000 per year per pupil in twenty experimental districts. It might do the same with gifted pupils or low achievers. It would merely be forbidden to base spending variations on district wealth.

3. Any valid system must be more (or less) expensive.

Any necessary effect of *Rodriguez* upon spending levels is purely imaginary since the principle itself suggests nothing respecting the level of spending. If the legislature wishes, total cost could be reduced. Of course the legislature can spend more if it pleases. Its total discretion is illustrated by the difficulty defendants' amici have in deciding which way spending will go. Consider two pictures of tomorrow drawn from the same brief submitted by a number of affluent school districts and State attorneys general. The first picture: "That the end result of a Rodriguez rule,

and the regime of full state funding enforced by it will be a reduction in total educational spending is apparent." Brief of Liebman et al., at 54. Forty-five pages later the same amici insist: "The relief sought by Plaintiffs will result in staggering costs to already heavily burdened state governments." *Id.* at 99. Both these predictions are argued vigorously and at length —that spending will surely go down (pp. 48-54) and that spending will surely go up (pp. 99-107). Their fellow amici pack this all into one sentence. They say *Rodriguez* ". . . can only result in an irrational upward or downward leveling of educational expenditures . . ." Brief of Clowes et al., at 57. There is of course a third possibility. We confess ignorance of the likeliest outcome; the political process will decide.

4. Compliance will destroy public education.

If anything can save public education, it will be the minimal respect for rationality and justice represented in fiscal-neutrality. In fact, the rule has been excoriated by one critic precisely because it will save public education which he regards as objectionable on ideological grounds. Spring, "Equal Opportunity and the Mythology of Schooling", *Educational Theory,* 347 (Summer, 1971).

5. Rodriguez is part of an "egalitarian revolution".

As now should be clear, the standard adopted is scarcely egalitarian. It guarantees neither equal spending nor any spending. It merely rejects those spending differences now based upon district wealth.

6. The property tax is threatened.

So far as amici can ascertain, no plaintiff in the school finance cases has even alleged the invalidity of the property tax, at either the state or local level. Certainly nothing in the *Rodriguez* record or opinion would suggest it.

7. Rodriguez is a poor man's complaint.

It is true and relevant to the nature of their injury that plaintiffs are poor; pupils from poor families living in poor districts suffer most from the present system. However, the evil here attacked is district poverty—it represents a systematic governmental discrimination affecting children whose families are of all income classes.

8. Rodriguez will help (or hurt) private schools.

Rich district amici argue that *Rodriguez* is an assault upon *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), Brief of Liebman et al., at 11, and mistakenly attribute to counsel in the instant brief the suggestion that ". . . the right to private education should be further burdened" (at 50).[1] The fact is that

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[1]Having published a book arguing for the legislative extension of the *Pierce* right, counsel can scarcely be accused of being anti-private schools. Coons and Sugarman, *Family Choice in Education: A Model State System for Vouchers* (Berkeley, The Institute of Government Studies, 1971). See also Coons, "Recreating the Family's Role in Education", 3-4 *Inequality in Education* 1 (1970); Coons, Clune, and Sugarman, *Private Wealth and Public Education,* 256-68 (Cambridge, Harvard University Press, 1970) (hereafter "Private Wealth"); Coons, "Community-Controlled Schools: Some Theoretical and Economic Problems", 23 Stan. L. Rev. 846 (1971); Coons and Sugarman, "Family Choice Systems: A Report to the New York State Commission on the Cost, Quality, and Financing of Elementary and Secondary Education" (1971).

the rule adopted below has nothing whatsoever to do with schools that are not publicly financed.

9. Big cities will be hurt.

Perhaps it is enough to note that this suggestion comes from Grosse Pointe, Bloomfield Hills, and Montgomery County. Brief of Liebman et al., at 83-99. Big cities themselves are in this appeal as amici for plaintiffs in support of the ruling below. This is not to suggest that *Rodriguez* will help all cities. Some cities are presently very poor and will automatically be helped; some are relatively well off and *could* be hurt. The outcome for these latter cities depends entirely upon the formula adopted by the legislature to respond to special urban burdens. Of course some cities might have preferred a constitution standard guaranteeing their "needs", but they are satisfied with a rule of constitutional neutrality which leaves them free to persuade the legislature respecting those needs. This is precisely why San Francisco, which appeared as plaintiffs' amicus in *Serrano v. Priest*, 5 Cal.3d 584, 487, P.2d 1241 (1971), is now before the legislature of California lobbying for a formula responsive to urban problems and permitting local choice of spending level. Brief of Liebman et al., pp. 94-95.

10. Minorities will be hurt.

Minority persons will be helped or hurt according to the taxable wealth of their district and the new spending systems adopted. As with any neutral constitutional principle, the point is not to reward a par-

ticular class or to determine in advance who shall be the beneficiaries. If one is inclined to let minorities speak for themselves, the most reliable statement of their interest is appellees' brief in chief, signed by counsel for one of the largest national minority organizations.

The effective antidote to all such phantasmagoria is a reading of the amicus submissions of parties particularly interested in school bonds. See Brief of Bond Counsel and Brief of Republic National Bank of Dallas et al. These documents, prepared with meticulous care and sobriety of tone, represent the opinion of dozens of the nation's most distinguished and experienced school bond counsel and their respective firms. They demonstrate two crucial conclusions: First, school districts can readily adjust to the *Rodriguez* rule so long as it is prospective only; second, legislative discretion and local choice are in no wise threatened. The brief of the Texas Banks in support of the Jurisdictional Statement illustrates specifically, at pp. 20-22, a number of decentralized systems that these experienced school counsel and their clients regard as feasible.

The short of it is that fiscal neutrality is a constitutional standard of extraordinary restraint. Far from confining the legislature it liberates a political system long deadlocked by the very structure of educational finance. This prospect is fearful only to those who would shun the democratic process.

PART I. THE FACTS: TEXAS MAKES THE QUALITY OF EDUCATION A FUNCTION OF WEALTH

Defendants would have the Court ponder subtle and distracting questions of economics and social science, but amici will demonstrate the vanity of these inquiries. The only relevant facts are those simple and undisputed fiscal data which manifest the powerful relation between district wealth and district spending.

The discussion emphasizes three points:

(1) School spending per pupil is largely determined by district wealth.

(2) District property wealth is real wealth; if a district's property wealth does not correspond in every instance to its collective personal wealth, the State is not thereby vindicated.

(3) Doubt concerning the relationship of dollars to educational quality is for the state and school districts—not the children—to resolve. Plaintiffs object only to the double standard: one guess for poor districts, another for rich.

(1) Texas law makes spending for each child's public education a function of district wealth.

The Texas school finance system favors wealthy districts—those with greater taxable resources per pupil to draw upon. Above the dollar level of the state-assisted minimum plan Texas invites such districts to raise and spend money at levels closed to the poor. Since the differences in wealth among districts are enormous, the consequent differences in district expenditure levels are enormous, and the children of the poorer districts are the victims. The statutory mech-

anism responsible for this outcome assigns uniform responsibility for education to districts which, however, are given wildly varying tax ability; spending is tied to the accident of local wealth per pupil. Local wealth for these purposes is property value since it is the property tax which the state has assigned to school districts for use in financing public education.

The ranges of wealth and spending in Texas are gigantic. Data provided to plaintiffs by the Texas Education Agency show that in 1967-68, among districts with over 500 pupils, market value of taxable property ranged from an estimated $7,000 per pupil to more than $500,000 per pupil. Spending (without federal funds) for current operations ranged from below $200 to over $900 per pupil. Of those 79 districts with over 5,000 pupils the richest enjoyed twenty-three times the wealth of the poorest; the former spent $754, the latter $215 (without federal funds).

The following table lists the 15 highest spending and the 15 lowest spending of Texas' 79 districts which in 1967-68 had more than 5,000 pupils. The table lists 1967-68 per pupil expenditures for current operations (without federal funds) and estimated market value of taxable property per pupil. The wealth-spending relationship could not be much clearer; all 15 high spenders have substantially more wealth than have all 15 low spenders.

Texas School Districts With Over 5000 Pupils in Average Daily Attendance in 1967-68: Wealth and Spending Comparisons of 15 Highest and 15 Lowest Spending Districts.

District	15 Highest Spending Districts Expenditure Per Pupil (Without Federal Funds)	Estimated Market Value Per Pupil
Deer Park	$754	$144,685
Highland Park	604	102,401
Brazosport	576	82,454
Goose Creek	572	74,453
Calhoun	543	107,565
Texas City	526	60,836
Midland	525	39,467
Galena Park	522	42,798
Ector	519	66,747
South Park	519	62,113
West Orange	519	58,332
LaMarque	517	57,568
Port Arthur	515	67,844
Port Neches	511	65,902
Clear Creek	502	97,978

District	15 Lowest Spending Districts Expenditure Per Pupil (Without Federal Funds)	Estimated Market Value Per Pupil
Laredo	$210	$10,250
Edgewood	215	6,239
So. San Antonio	251	11,572
San Benito	284	10,097
Killeen	293	13,474
Ysleta	296	13,874
Weslaco	302	11,207
Harlandale	304	11,706
Brownsville	307	12,098
Northside	325	22,727
Pharr-San Juan	329	14,617
Northeast Houston	341	14,213
Mesquite	342	16,928
Texarkana	348	27,910
San Antonio	350	22,418

This picture is mirrored in plaintiffs' table V (App. 208) set out in Brief of Appellants at p. 12, which we summarize as follows:

Market Value Per Pupil	Average State and Local Revenues Per Pupil
10 Districts Above $100,000	$815
26 Districts $100,000-$50,000	544
30 Districts $50,000-$30,000	484
40 Districts $30,000-$10,000	461
4 Districts Below $10,000	305

In Texas the connection between district wealth and district spending is inescapable, and the magnitude of its effects upon spending is significant.

It is sometimes suggested that the reason that some districts spend more on their pupils than do others is that they "care" more and hence make more of a tax effort. It is true of course that different local tax efforts do have a bearing on district spending levels. However, measuring tax effort by the tax rate that the district is willing to impose, it is clear that, if anything, the poor "care" more in Texas, because they tend to have higher tax rates than do the rich districts. In short what is really happening, in general, is that the richest districts are coasting, taxing their immense wealth at a low rate. The poorest districts, though they carry higher rates, cannot overcome the wealth advantages of the rich.

This is shown by plaintiffs' Table II (App. 205) which we reproduce below.

Table II

The Relationship of District Wealth to Tax Effort and Tax Yield
Texas School Districts Categorized by Equalized Property Values, Equalized Tax Rates, and Yield of Rates

Categories Market Value of Taxable Property Per Pupil	Equalized Tax Rates on $100	Yield per pupil (Equalized Rate Applied to District Market Value)
Above $100,000 (10 Districts)	$.31	$585
$100,000-$50,000 (26 Districts)	.38	262
$50,000-$30,000 (30 Districts)	.55	213
$30,000-$10,000 (40 Districts)	.72	162
Below $10,000 (4 Districts)	.70	60

We have not yet said anything about the Texas "state aid" plan. This is because it is not this part of the finance scheme which gives rise to the system's unconstitutionality. In fact, Texas could distribute the same amount of "state aid" far more fairly (i.e., more to the poorer districts, less to the rich). Thus, while defendants' statement that state aid "has a mildly equalizing effect" (Brief of Appellants, p. 3) is probably a reasonable interpretation of the facts, this is hardly to the State's credit. The Texas plan could be much improved if some of its anti-equalizing

features were removed.[2] Improved, yes, but invidious and significant wealth discrimination will continue, for, as presently constituted, state subventions are structurally inadequate to deal with the system's bizarre maldistribution of resources.

(2) Appellants misunderstand the respective relevance of personal and district wealth.

Defendants argue at length (pp. 20-25) that the court's finding of a coincidence of district poverty and low family income is disputable and that the result below, therefore, is bottomed on an "unsound factual assumption." They imagine, for reasons undisclosed, that the "wealth" revelant to the constitutional rule adopted below is the income of district residents. But,

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[2]1. The "Available School fund" program should be eliminated; this provides money to districts which are too rich to receive aid under the "Minimum Foundation Plan" and hence neutralizes much of what the foundation plan might do to benefit the poor.

2. The "Minimum Foundation Plan" guarantees should be calculated in terms of student needs rather than be based on teacher salary schedules; giving greater state subventions to districts which hire teachers having advanced degrees means giving more money to the rich districts which can afford to employ a greater number of such persons.

3. It is not surprising, then, to find out how little (if at all) the state subventions help the poor districts in Bexar County where plaintiffs reside. We reproduce selections from Plaintiffs' Table VII (App. 216) which is printed at Brief of Appellants, pp. 12-13.

District	1967-68 Market Value of Property Per Pupil	1967-68 State Aid Per Pupil
Edgewood	$ 5,960	$ 222
Harlandale	11,345	250
North Side	20,794	248
San Antonio	21,944	219
North East	28,202	233
Alamo Heights	49,478	225

as the court below held, it is district poverty which is constitutionally crucial, for this is the barrier which operates to deprive plaintiffs of their rights. That the wealth of a collectivity is relevant for constitutional purposes is further discussed in Part II below.

As for the court's finding regarding the relation between district poverty and low family income, while it is unnecessary to determine the legal wrong, it does confirm the common expectation that those in fact injured by the system tend more to be children of the poor than the rich.

As we are here concerned with alleged factual disputes, we will now imagine that defendants' puzzling argument is refined to suggest that real property value in a district is an untenable measure of district wealth. Even so such an argument is without merit.

First, as defendants themselves elsewhere note (Brief of Appellants, p. 13), the standard of district wealth accepted below is simply the one adopted officially by the Texas legislature in establishing the apparatus of the local educational property tax—that is, market value of taxable property per pupil. If there is an "unsound factual assumption" in this, it has been supplied by the State. Further, there is certainly no indication that the legislature adopted this standard with the quaint expectation that high property value districts would be low spenders. Obviously, the property tax is made available under the assumption that rich districts will more easily be able to raise funds if they so desire.

Secondly, it is plain from the record itself that assessed property wealth—whatever its faults—is in fact an excellent measure of district ability to spend for schools. The powerful empirical correlations shown between property values and spending permit no reasonable doubt of their interdependence.

Thirdly, any argument that ability to spend should be measured only by personal income ignores the enormous amount of industrial and commercial property which the property tax makes available to the schools.

The income of families is, of course, relevant to the character of the injury. Children of the poor living in poor districts do suffer more than their nonpoor neighbors because they cannot escape to private schools. Yet this does not by any means confine the injury to the poor. Children of the middle class and the rich often prefer those values which are represented in *public* education and to which they are entitled. When such families living in poor districts feel they must choose private schools out of desperation rather than native preference, they have suffered substantial injury. Possibly this argument is "sophisticated", as defendant complains (Brief of Appellants, p. 20); but it is also true.

(3) The quality of education is diminished by district poverty.

The court below found that, because of their greater spending power, affluent districts can provide a "higher quality education". 337 F. Supp. at 285. In their Jurisdictional Statement, defendants em-

phasized this same relation between expenditure and educational quality; it is the basis of their prediction of rich district reaction to a neutral system: "It is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of their education is reduced." Jur. St., p. 8.

Again, in their brief now before this Court, defendants note that ". . . [D]ecisions on a statewide basis about spending levels, would . . . promote uniform mediocrity." Brief of Appellants, p. 46. Thus, throughout several rounds of pleadings, a full trial, a jurisdictional statement and portions of the briefs the parties have shared common ground concerning the nature and reality of the injury to plaintiff-children from the current system. These pupils had fewer of the educational goods and services—the educational inputs—that money buys; their opportunities were to that extent impaired. The record abounds with plaintiffs' proofs and defendants' admissions of the objective differences between rich and poor districts.

Now, at the eleventh hour—elsewhere in the same brief—defendants change course. They announce that the injury found below is unproved, only an assumption—and an "unsound" one at that (pp. 16-20). They are joined in this new and inconsistent argument by affluent amici districts—Grosse Pointe, Montgomery County, Beverly Hills, and others. See Briefs of Liebman et al, and Clowes et al. One is tempted to sarcasm by an argument from rich districts that higher spending buys no additional education. None-

theless the Court should be assured that the view taken below is in fact responsible and correct, and amici will treat the point seriously.

Here is the sole sentence in defendants' brief by which they seek to justify raising this question: "There was conflicting testimony before it [the court below] on whether quality of education can be measured by dollars spent (Graham and Stockton Depositions)." Brief of Appellants, pp. 17-18.

It is our unpleasant responsibility to note that this statement is flatly—though surely inadvertently—incorrect. There is simply *nothing* in either of the depositions cited which suggests the inefficacy of money; there is a great deal in the Graham deposition which flatly asserts the opposite—and these were defendants' witnesses.[3] As the testimony in the margin suggests, *all* parties and the court did share one assumption. This is that if a school has better facilities, better teachers, more teachers, a broader curriculum, a counseling program, and/or the multitude of other educational goods and services that dollars buy, it will—on the average—provide a superior educational opportunity. With the President's Commission

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[3]Dr. Stockton had literally nothing to say on the subject. See Stockton deposition, Doc. No. 178. Mr. Graham's testimony included the following:

"Q. . . . [B]asically the amount of money, considering other factors to be equal, has an important effect on the quality of education?

A. Yes, if all other factors . . . were absolutely equal, then you would have to say the amount of money would affect it rather markedly . . ." Graham deposition, p. 46. Doc. No. 177.

the parties until this point ". . . recognize[d] that money builds schools, keeps them running, pays their teachers, and, in crucial if not clearly defined ways, is essential if children are to learn". President's Commission on School Finance, *Schools, People, and Money: The Need for Educational Reform,* xi (1972).

Amici's own view on the cost/quality question—like that previously held by defendants—is that the State is properly judged by its own actions and not by the subjective individual pupil response thereto. This has been the historic approach of the Supreme Court which faced this question in a parallel form nearly a quarter of a century ago in another case from Texas. In *Sweatt v. Painter,* 339 U.S. 629 (1950), the issue was the objective educational "equality" of racially separate law schools. The Court specified the goods and services that extra money can buy—more facilities, distinguished teachers, more teachers, variety of courses, specialization, a larger library. *Id.* at 633-34. It decided that the Negro school was unequal, because it had less of these purchasable things. "It is difficult to believe that one who had a free choice would consider the question close." *Id.* at 634. This approach is confirmed in dictum in *Brown v. Board of Education,* 347 U.S. 483, 492 (1954). For the Supreme Court equality in the racial cases has always been measured in terms of the opportunity to learn. The question has not been, for example, whether black children scored at a particular level in a specific skill, but rather whether the state had systematically provided Negroes with inferior opportunity. The test is one of *inputs*

by the State, not of performance by pupils on a narrowly focussed battery of tests. Even if black children were literally incapable of improving their test scores, this would not justify the input discrimination.

This view that input and opportunity define quality is imbedded in the legislated structure of Texas school financing. The statutes of Texas empower Alamo Heights to spend at its present high level only because the district continues to buy education with every dollar. The teachers and facilities procured by rich Alamo Heights, whatever their number or specialty, all represent part of that district's fulfillment of its one statutory responsibility—to educate. The Texas "state aid" program presently reinforces this point by supporting higher salary levels for more experienced and better educated teachers. The State cannot disavow the effects of these expenditures. As the district court noted in *Van Dusartz v. Hatfield,* 334 F. Supp. 870, 873 (D. Minn. 1971), ". . . the Legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending." It is, of course, conceivable that certain teachers in Alamo Heights and similar districts are compensated for engaging in activities with no educational objective or effect; it is further possible that rich districts are systematically inefficient. There is, however, no suggestion of either in the record, nor would this be a common sense assumption. Even if it were assumed without evidence that the State is less certain that spending in higher ranges is equally efficacious, it should resolve that uncertainty even-

handedly. It is unfair that only children of rich districts be given insurance against the unknown. Plaintiff children ask only to be included in the State's calculation of money's worth; they do not challenge it.

The plaintiffs have made a prima facie showing of injury by proving disparities in spending. As in *Sweatt v. Painter supra* they have gone further and in a multitude of ways shown the effect of these disparities upon the objective character of education. See e.g., Deposition of Berke, App. 220. The State itself has defined the school districts' function as education. Even if there were an issue, under *Sweatt v. Painter, supra* the defendants in such circumstances would necessarily carry the burden of demonstrating that spending above some absolute level is educationally wasteful. Indeed, they are the only parties in a position to supply proof on such a question. Since none was offered, the issue is pretermitted.

Nevertheless, the defendants persist in the effort to cast the burden upon plaintiffs, heedless of the absurdity to which this leads. Concerning the "asumption" below of the relation between spending and quality they say: "It is enough that these assumptions are not demonstrably true and that they remain fighting matters among those concerned about these things. In connection with whether obscenity has a harmful effect, the Court has noted that there is a growing consensus that while a casual (sic) link has not been demonstrated it has not been disproved either. In that situation, the Court said, legislation that proceeds on the premise that obscenity is harmful has a ra-

tional basis." Brief of Appellants, at 25. Precisely so; but this supports the children, not the defendants, for *it is the legislature's own assumption of fact that the children here assert.* It is they, not defendants, who credit the Texas legislature with an educational purpose when it established the education code. This is not a case in which the statutory premise is challenged by individuals, but a unique historic instance in which the State itself brazenly seeks to repudiate the assumption upon which its own legislation is grounded. And for what purpose? To legitimate it! It is hard to know what to say about such a legal argument. Even if it succeeded, it would demonstrate only that the system was utterly irrational, hence void on other grounds.

This burden is on the defendants even if the Court were at this late stage of the case, as defendants urge, to consider the constitutional standard only in terms of subjective or "output" measures of quality. That is, since the legislature has naturally and reasonably assumed that children are affected by the schools in various beneficial ways, by defendants' own rationale they carry the burden of proving the assumption unsound. On this point, however, the defendants merely cite social scientists to demonstrate that the linkages of money to test scores "remain fighting matters among those concerned about these things". Brief of Appellants, at 25. For two kinds of reasons this is insufficient, even apart from the fact that defendants properly should be forbidden to pursue this statistical quiddity at this stage of the litigation.

First, defendants have hardly carried their burden by pointing to disputes among experts about money and test scores.[4] Second, test scores scarcely constitute

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[4]However, lest misunderstanding be risked, amici will respond on the merits. There is statistical evidence from the very scholars and professionals relied on by defendants that money does count —and even for the narrow purpose of test scores. Indeed, Professor James Coleman is himself the author of the lengthy and favorable "Introduction" to *"Private Wealth"*. His support is not surprising. The justly famous "Coleman" Report which accidently spawned the statistical debate over the ability of money to raise test scores was itself not designed to answer such a question. Office of Education, U.S. Dept. of Health, Education and Welfare, *Equality of Educational Opportunity* (1966) at iii-iv. Coleman's purpose was to measure the consequences of being black in the public schools. His concern with spending was confined to avoiding statistical misadventures with his racial data. Hence, only the crudest information on spending was gathered; for example, there is simply no fiscal data in the Coleman Report which ties spending to the child himself as he moves through school (or from school to school); the data are school and district data only. Therefore, Professor Marshall Smith concludes, "We cannot estimate from the information given in the Report what the achievement of a student might be if he were exposed to a particular set of school resources and not to some others." And, again, ". . . if the survey had gathered data on the utilization of the school resources differentially among students within schools, the conclusions of the Report might have been very different." Smith, "Equality of Educational Opportunity: The Basic Findings Reconsidered", in Mosteller and Moynihan (eds.), *On Equality of Educational Opportunity*, 239 and 249 (New York, Random House, 1972). (Hereafter "Mosteller and Moynihan")

It is precisely the absence of specific and "longitudinal" information which has invited the academic logomachy among statisticians. Smith, in *Mosteller and Moynihan* at 247, 315-316. Professors Hanushek and Kain note that the methodology employed in fact blocks any assessment of the effect of additional resources: "It does not even give the direction, let alone the magnitude, of the effect that can be expected from a change in inputs." "On the Value of *Equality of Educational Opportunity* as a Guide to Public Policy," at 135, in *Mosteller and Moynihan*. These authors conclude: "As a pioneering piece of social science research, the *Report* deserves considerable praise. However, as a policy document, it must be evaluated differently. In this guise it is potentially dangerous and destructive." Id. at p. 138.

Finally, notwithstanding the criticism of the Coleman Report, the Coleman data indicate ". . . that the quality of teaching does

the whole of education. This Court itself has had sufficient recent experience with standardized tests to be sensitive not only to their unreliability in measuring skills, but also to the limited scope of the skills tested. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Hence even if the statistical debate about money and test scores some day were made satisfying and complete—and even if it turned out that the absence of a connection between money and scores on particular tests were "proved"—the conclusion here would be unchanged. It is simply false to the nature of education to suppose that its substance is exhausted by a child's response to standardized tests. "In education the 'product' consists of the knowledge, skills, attitudes, and values that pupils choose to build into *themselves*. These products are not readily specifiable, nor, in a pluralistic society, is it altogether clear who should do the specifying." Dyer, in *Mosteller and Moynihan*, at 388. Professor Marshall Smith would add the following: "*Verbal Achievement*, may in no way be representative of the outputs that the resources are intended to affect. Science laboratories might be

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indeed make for differences in the quality of pupil learning." Dyer, "Some Thoughts About Future Studies", in *Mosteller and Moynihan* at 412. Since good teachers in general can command higher salaries, the connection to money is made. (see Deposition of Graham, p. 48); since teachers salaries consume approximately 80% of the current budget in Texas schools (see Texas Education Agency, Estimates and Projections for Texas Public Schools, Tables XI and XIII (1972)) the connection to *Rodriguez* is made. That is, it could be made if that were the issue.

effective for teaching a way of thinking—experienced teachers may exercise a more acceptable form of control over potentially unruly classes. Neither 'resource' may contribute to the skills tapped by conventional standardized tests of achievement." Smith, in *Mosteller and Moynihan,* at 314-15.

Thus we conclude that, whatever his test score, a child—and society—have much to gain or lose from the total school experience, if it be only the child's opportunity to acquire "acceptable social values and behavior norms". B. Weisbrod, *External Benefits of Public Education,* 28 (1964). A family which somehow is able to move from Edgewood to Alamo Heights may not add a point to its child's test score. Nevertheless, it has added to his *education* some very specific skills and experiences that Edgewood could never provide. His exposure to carefully selected teachers, adequate facilities, personal attention in uncrowded classes, and a choice of courses from a broader curriculum represent educational values of the highest order—even if inexpressible in statistics. The chance to learn a foreign language, to paint, to play the cello, to construct a table, or merely to attend school in a decent physical environment may help to get the young person a satisfying job, to ennoble his spirit, and to make him a better citizen. Perhaps if poor districts were better financed this is precisely where the extra money would go. Amici believe such aspects of education to be enormously important. And, as Professor Karst observes: "If a wealthy district can afford an astronomical observatory and a poor district

cannot, the luxury item in the wealthy school may make little difference to achievement test scores. But it will stand as a continuing reminder to the students in the adjoining poor high school that society does not think their aspirations should reach so high. In the separate-but-equal era, after all, school boards sometimes argued that the schools set aside for blacks offered some courses that were not available at the white schools—such as bricklaying." Karst, *"Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Constitutional Law,"* 60 Calif. L. Rev. 720, 750-51 (1972).

Finally, it would be strange to suppose that the forms taken by education today are beyond mutation in ways that might be assisted by money. With virtual revolutions under way in a half dozen scientific, technological, and sociological fields of inquiry, the conclusion that mankind has reached a dead end in education does not commend itself as a ground for constitutional decision. See generally, Gilbert and Mosteller, "The Urgent Need for Experimentation," in *Mosteller and Moynihan,* at 371. We embrace the view of this matter taken by the rich school districts of Los Angeles County in their brief for defendants before this Court: "Our concepts of educational services to be provided are by no means static; they are in this modern area (sic) undergoing revolutionary changes." Brief of Clowes et al., at 37. "Thus not only the techniques but basic concepts of education are in the process of rapid innovative changes (sic)." *Id.* at 40.

PART II. THE LEGAL ARGUMENT: THE FIRST AND FOURTEENTH AMENDMENTS GUARANTEE FISCAL NEUTRALITY IN PUBLIC EDUCATION.

Amici's constitutional argument for fiscal neutrality is supported by several distinct considerations.

(1) Discrimination by School District Wealth Triggers Close Judicial Scrutiny.

(2) Education is a First Amendment Value Entitled to "Fundamental" Status Under the Equal Protection Clause.

(3) The Infancy of the Victims Supports the Application of the Compelling Interest Test.

(4) No Interest of the State is Threatened by Fiscal Neutrality Which Leaves Vast Discretion in the Legislature.

(1) Discrimination by school district wealth triggers close judicial scrutiny.

Amici will not restate the nature and gravity of the injury to plaintiffs, described in Part I, which arises from the wealth classification in this case. It is clear that plaintiffs are hurt by the unevenhanded state system.

This Court has frequently and without deviation declared that classifications based upon wealth are suspect and require close judicial scrutiny. Dozens of cases since *Griffin v. Illinois,* 351 U.S. 12 (1956) have treated classification by wealth either as a signal of irrationality *(Lindsey v. Normet,* 405 U.S. 56, 79 (1972)) or as an intolerable burden upon a "funda-

mental" interest *(Harper v. Virginia,* 383 U.S. 663 (1966)). Amici will not canvass the many relevant decisions. It will be sufficient to emphasize that, contrary to defendants' assertions (Brief of Appellants, at 20), this case is not the first before this Court in which the relevant poverty was that of a group rather than an individual. In *Bullock v. Carter,* 405 U.S. 134, 144 (1972), the impact of the discrimination fell upon the class of "voters supporting a particular candidate".

In any event, the other (principally earlier) wealth cases should not be read to limit the principle to individual poverty. The Court has avoided any such suggestion, and it would be peculiar to suppose that persons deserve special protection simply because of their general economic vulnerability. It is not the general life circumstances of the injured person but his inability to pay for the protected interest that is suspect. The poor man may constitutionally be excluded from the swimming pool for want of the admission price; but the poll tax is invalid even as applied to a rich man temporarily without funds. At ground the principle is simply that it is grossly unreasonable to condition fundamental rights upon ability to pay. Poor school districts lack the ability to pay; it is their wealth which determines the level of spending for education. Not even a rich man can buy good public education; for this there are no individual purchasers. There are only individual victims of a district's collective lack of purchasing power. It would be absurd to question the relevance of collective poverty in this case.

If this is not the first example of discrimination by wealth against groups of persons, it is the first in which the relevant poverty is an artifact of the legislative scheme itself. It is difficult to imagine a more appropriate circumstance for close judicial scrutiny. The special invidiousness of this discrimination by wealth was put very directly by the opinion in *Van Dusartz*:

> . . . [t]he objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned. The heaviest burdens of this system surely fall *de facto* upon those poor families residing in poor districts who cannot escape to private schools, but this effect only magnifies the odiousness of the explicit discrimination by the law itself against all children living in relatively poor districts. 334 F. Supp. at 875-76.

In *Serrano* the California court rejected the suggestion that such wealth discrimination was merely "de facto":

> . . . [w]e find the case unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the state, such patterns are

> shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. [citation] Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. [citations] Compared with *Griffin* and *Douglas*, for example, official activity has played a significant role in establishing the economic classifications challenged in this action. 5 Cal.3d at 603, 487 P.2d at 1254.

Amici do not insist that, by itself, discrimination by wealth is decisive. No court has so held. Rather, it is the conjunction of the suspect classification with a fundamental interest—here education—which bespeaks the constitutional rule adopted below.

(2) Education is a first amendment value entitled to "fundamental" status under the equal protection clause.

The conclusion below that education is "fundamental" serves two functions in constitutional analysis. First, it is what entitles the plaintiffs to relief, unless the State can show a compelling interest to support its discrimination (a matter discussed below) *Bullock v. Carter, supra.* Simultaneously it distinguishes education from nonfundamental interests, thereby suggesting appropriate limits to future judicial action.

Over recent years the boundaries of fundamentality have become clearer. On the one hand the Court has refused to abandon the traditional test of rationality when it reviews purely "social and economic" regu-

lation; the opinions in *Dandridge v. Williams, supra,* and *Lindsey v. Normet, supra,* seem to relegate welfare and housing respectively to such a category of commonplace interests. Meanwhile, however, the Court has repeatedly reaffirmed the fundamentality of voting and political association. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Bullock v. Carter, supra; Williams v. Rhodes,* 393 U.S. 23 (1968). In which category does education stand?

This Court has spoken to the question in a number of instances, most notably in *Brown v. Board of Education, supra.* All are familiar with the famous paragraph which concludes that ". . . the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 493. While *Brown* was a "race" case as its subsequent career emphasizes, it is equally true that for the Court the nature of the interest at stake—education—played a primary and independent role in the decision. The Court emphasized that, whatever may have been the constitutional status of education when the Fourteenth Amendment was adopted: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492-93. Thus, the Court's analysis implicated the fundamental interest concept in the case of "the most important function of state and local governments." *Id.* at 493.

While this independence and special significance of the educational interest was naturally obscured by the emphasis upon race in the later school cases, it has appeared frequently in other work of the Court.[5] In the Court's most recent term, in *Weber v. Aetna Casualty & Surety Co.*, 92 S.Ct. 1400, 1405 (1972) education was recognized in the majority opinion as a "fundamental personal right".

Defendants nonetheless argue that education is not a fundamental interest, relying upon the broadest interpretation of *Dandridge v. Williams, supra.* Even accepting this severest test of fundamentality, amici will show that education is easily and properly in-

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[5]It is manifested in language from a wide range of nonracial cases. In *McCollum v. Board of Education*, 333 U.S. 203 (1948), Mr. Justice Frankfurter, concurring, described the public school as "the most powerful agency for promoting cohesion among heterogeneous democratic people. . . ." *Id.* at 216. "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Id.* at 231.

In *Abingdon School District v. Schempp*, 374 U.S. 203, 230 (1963), Mr. Justice Brennan, concurring, noted that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."

Recently in *Palmer v. Thompson*, 403 U.S. 217, 229 (1971), Mr. Justice Blackmun concurred in permitting the closing of previously segregated municipal pools but added that "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety."

Finally in *Wisconsin v. Yoder*, 92 S.Ct. 1526, 1532 (1972), the Chief Justice writing for the majority suggested that, "Providing public schools ranks at the very apex of the function of a State." For general discussions of the fundamentality question see *Serrano v. Priest, supra*, and *Private Wealth* at 364-366, 370-373, 387-390, 397-419. Given the general importance of education and the language of past decisions there is little doubt that the fundamentality of education is already a part of our constitutional jurisprudence.

cluded among the inner circle of cherished rights. Speaking for the majority in *Dandridge* Mr. Justice Stewart suggested a division between purely social and economic regulation on the one hand, and, on the other, ". . . regulation . . . affecting freedoms guaranteed by the Bill of Rights. . . ." 397 U.S. at 484.

In terms of the present case *Dandridge* thus asks: *Does education "affect" speech, voting, political association or other freedoms guaranteed by the Bill of Rights?* Amici insist that it does; education stands squarely planted on the constitutional feet of politics and speech.[6] It is at once a political activity of the first order and *the* primary and deliberate influence of the state upon the intellectual life of its citizens.

Education as an Intellectual Right. The particular burdens here imposed by wealth discrimination fall

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[6]This Court has already described education specifically as a right encompassed by the First Amendment's guarantee of freedom of speech, tracing the relevant judicial history to the 1920's. Thus in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court states that ". . . By *Pierce v. Society of Sisters, supra*, the right to educate one's children as one chooses is made applicable to the states by the force of the First and Fourteenth Amendments". 381 U.S. at 482. In *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), the Court again interpreted *Pierce v. Society of Sisters, supra* and *Meyer v. Nebraska*, 262 U.S. 390 (1923) as based upon the First Amendment and spoke of the rights of students, as students, arising thereunder. 393 U.S., at 506-07. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968).

Technically, it may have been stretching a point for the Court to cite *either Pierce* or *Meyer* as First Amendment cases. Each is, formally speaking, an example of substantive due process, and neither specifically mentions the First Amendment. Nevertheless, the Court is clearly correct in its modern interpretation of these cases, for their very core is the recognition that education's impact upon the personality, intelligence, and loyalties of children raises fundamental issues of freedom of the mind. It is not surprising that *Pierce* and *Meyer* show a current vitality uncharacteristic of substantive due process decisions generally.

upon the child's right to know and to receive information. That right has been repeatedly declared by this Court. Thus *Sweazy v. New Hampshire,* 354 U.S. 234, 250 (1957), speaks of the right of students ". . . to inquire, to study and to evaluate, to gain new maturity and understanding . . .", and *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) describes the classroom as a unique example of the "marketplace of ideas". The right to receive information is sufficiently precious that it moved this Court in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) to the first invalidation in history of a federal statute on First Amendment grounds. In a unanimous judgment the *Lamont* decision struck down the federal act and regulations which required addressees of communist political propaganda to specifically request such mail before it would be delivered by the postal authorities. Not only was the intended recipient of speech there recognized as the locus of the First Amendment right, but the protection of the flow of ideas extended even to unsolicited information. *Lamont v. Postmaster General,* 229 F. Supp. 913, 916 (S.D.N.Y. 1964).

The school child surely qualifies as an intended audience as easily as the addressee in *Lamont.* Indeed, the State here has created a multi-billion dollar information system which is justified precisely by its specific and powerful influence upon the child's mind. The State views the flow of the particular information in this system as so important that it conscripts the infant audience. But conscription aside, the nature of the thing is perfectly clear: public education is a

system of speech, and there is no way to avoid the First Amendment implications when the audience asserts objections to discrimination in its provision.

The protection of the right here asserted is supported by every consideration which has historically moved this Court in speech cases. Education and speech share the common objective that inquiry and debate in our nation remain informed and vigorous. It is even false to their nature to separate the two by the conjunction; education *is* speech, just as speech is always a form of education. And, if speech be precious, the full measure of judicial concern must likewise focus on those in our schools for whom the message of public education is designed.

Education as an Aspect of First Amendment Political Rights—The Child as Future Citizen. There exists an important relation between what is happening to the child in the Texas schools and what can be expected of him later as a decision maker in a democratic society. This, of course, includes his behavior as a voter. However, preparation for intelligent voting, though important (and even by itself decisive under the *Dandridge* formula) represents but a fraction of education's meaning for the political life of the *civis* in a democratic society.

Let us first offer a constitutional context for the discussion. This Court has identified a wide variety of political expression and associational activity specially protected under the First and Fourteenth Amendments. These "recognized rights" have a common

quality—all are designed to protect the citizen's role in the democratic political process by assuring both his access to ideas and his opportunity within the law to associate to promote such ideas as he supports. What is clear from a consideration of these rights is that it is the *total system of free political discussion* that is crucial; and it is the frustration of that system by government that is forbidden. And if it be the case that public education is indispensable to full and fruitful political intercourse, then the character of its dispensation is a First Amendment issue of grave consequence.

Education is not only important to political intercourse; it is the very gateway to all effective participation. It is that human activity which alone can justify the epistemological assumptions of a political democracy. Without it the constitutional dependence upon popular participation is merely absurd. Truly, when the state provides education it is engaging the child in perhaps his first—and certainly his first organized—political experience. On a mass basis the state deliberately—and, within limits, properly—affects the character of our political life in two distinct but related ways. First, through prescribed curricula the state largely fixes the major concepts and content of our political discourse. Indeed, as this Court emphasized in *Wisconsin v. Yoder, supra,* the state attempts to ". . . 'save' a child from himself or his . . . parents . . ." by enlisting his allegiance to the common beliefs and values of our society. 92 S.Ct. at 1541. See also *Pierce v. Society of Sisters, supra,* at 534.

Secondly, and equally important, the acquisition of skills and general culture through education powerfully conditions the young citizen's general capacity for effective participation in the life of his society, including government. *Serrano v. Priest, supra,* makes much of this political aspect of education:

> At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.
>
> The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. 5 Cal.3d at 608, 487 P.2d at 1258.

By transmitting the deposit of learning to the young, education enables our pluralistic society to identify itself as a people with a common destiny. As shaper of the child's capacity for civic contribution, education is indistinguishable from and an integral part of the rights of speech and association. When the State discriminates against children in the provision of education, it corrupts the very sources of free discussion and civic virtue.

Focussing exclusively as they do upon the social and economic aspects of education, all this is lost upon the defendants. Their sanguine and resolute emphasis upon the welfare and housing decisions causes them to miss the point. If anything is plain in the instant

case, it is that the discrimination is not limited to social welfare. A child's mind is constitutionally distinguishable from his stomach. *Dandridge* may reject "economic needs of impoverished human beings", as the criterion of fundamentality, 397 U.S. at 485, but this scarcely implies that discrimination respecting development of human intelligence is of the same order. Indeed, *Dandridge* actually stands for the opposite, citing *Shelton v. Tucker,* 364 U.S. 479 (1960), as an example of a general area in which the Court's intervention would be appropriate. 397 U.S. at 484. *Dandridge* is further distinguished from the present case by the absence therein of any wealth classification.

James v. Valtierra, 402 U.S. 137 (1971) is an inappropriate analogy for a like reason. The interest at stake in that case was housing. One may readily concede the *importance* of that interest to the affected individuals without conceding its constitutional relevance. Conversely its non-fundamentality tells us nothing about the issue here. Housing and welfare both being almost purely economic and social interests, any conclusion based thereon with respect to education is simply a non-sequitur.

A Note Concerning the Injury to First Amendment Rights. Nowhere have amici argued that the State must support or supply education any more than it must subsidize newspapers or provide loudspeakers. The State has no duty to promote the flow of ideas to children or anyone else. This, however, is no answer to the present complaint any more than to that in *Brown v. Board of Education, supra,* or even

Sweatt v. Painter, supra. So long as the State chooses to subsidize the flow of knowledge it is subject to elemental rules of fairness in its distribution. For example, it is plausible that a State could subsidize the costs of political campaigns, but it would raise an equal protection problem to do so for one party only. Nearer to home, this Court noted in *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969) that the State could not exclude the poor from its schools irrespective of the rationality of such a policy. Nor could it offer the use of its streets for the purveyance only of approved ideas. *Cox v. Louisiana,* 379 U.S. 536, 579-580 (Mr. Justice Black concurring). See the Court's explicit adoption of Justice Black's view in *Police Department of City of Chicago v. Mosley,* 92 S.Ct. 2286, 2291 (1972).

The injury here is, of course, somewhat different from these latter examples. Plaintiff children are injured not by total exclusion but by relative deprivation. For all that, the damage is no less real, as the *Brown* and *Sweatt* results make clear. Indeed, there is even a special quality of invidiousness in the relative deprivation here condemned. The State is operating a program of compulsory training systematically different in scope and quality for haves and have-nots among Texas districts. This form of division of its citizens is uncomfortably suggestive of the deliberate creation of intellectual classes. The reality of this view is confirmed by the emotional intensity with which the discrimination is defended by the affluent districts. Their anxiety is understandable; in fact it

buttresses our central point. Every decision concerning the distribution of education represents a choice about the locus of political influence in succeeding generations.

(3) The infancy of the victims supports the application of the compelling interest test.

The interests of children have traditionally been favored by the courts in a multitude of ways. This is in large part based upon the child's helplessness to change his station. For him each burden or discrimination imposed by the State is as inescapable as the laws of nature. In a recent decision involving discrimination against illegitimate dependents this Court has said:

> ". . . [V]isiting this condemnation on the head of an infant is illogical and unjust. . . . [I]t is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth . . . [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth where . . . the classification is justified by no legitimate state interest—compelling or otherwise." *Weber v. Aetna Casualty and Surety Co.*, 92 S.Ct. at 1406-7.

In *Rodriguez* the offending classification is not one of age. That is, the discrimination is within and among the general class "children" rather than between children and adults; it is only the children of poorer districts who suffer. This, however, does not dis-

tinguish *Weber* which also involved merely a subclassification of the general class of children. The point of the *Weber* language and its result seems to be simply that the Court will be especially solicitous of the rights of *all* children, since by nature they can have no "responsibility" for their status.

This preference for children has deep historic roots. Special judicial rules for the protection of minors formed a significant part of what the common law knew as the law of "Persons". See generally Blackstone, *Commentaries* (Jones ed.), Book I, Chs. XVI-XVII, 446-466 (San Francisco, Bancroft-Whitney, 1915). Today most of these protections have been codified. This special solicitude of the law for children is parallel to and harmonious with the historic application of the 14th Amendment to specially protect racial and similar minorities. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Graham v. Richardson,* 403 U.S. 365 (1971).

Children are simply excluded from the democratic process; they are the disenfranchised minority par excellence. Nor can it be supposed that children do not need the aid of courts because they are "represented" politically by their parents. The truth is that many children do not have voting parents, a neglect of their interest which these children are helpless to alter. Further, the parent who does vote must consider many needs and objectives of government that compete with those of the child. It would be unrealistic to assume that, on educational issues, parents vote as would their children if those children were franchised and aware

of their self interest. Any "proxy" suffrage, therefore, is seriously defective.[7]

Finally, the minority status of the victims is also relevant to the decision on the merits of plaintiffs' claim. Bearing in mind that the "compelling interest" rationale is involved, it may be useful to make a distinction between a child's rights on the one hand and a child's welfare (or "interests") on the other. Often these may clash, as in *Prince v. Massachusetts*, 321 U.S. 158 (1944), where a State law intended to protect the child's *welfare* forbade his exercising his *right* of speech under certain conditions. The court was torn by the dilemma but held 5-4 that the law protecting the child from his own or his parents wishes was valid. The *Rodriguez* case by contrast is not an instance of the State's assertion of the child's welfare clashing with the child's assertion of any inconsistent right. Here the dilemma of *Prince* is resolved, for the right and the interest—both being asserted by the child—are perfectly harmonious, leaving the State nothing to assert but tradition and

[7]There is another reason for the political impotency of the plaintiffs which would exist even if all parents of school children not only voted but voted solely for the best interests of their children. The predicament of the children living in poor school districts of Texas resembles that of the voters in underrepresented electoral districts prior to reapportionment. *Cf. Baker v. Carr*, 369 U.S. 186 (1962). Not only are rich districts politically potent, but their power to resist change is augmented by the relative neutrality of districts of middling wealth. Only the poor districts have seen reform as an unalloyed blessing; but such districts are politically as puny as the under-represented cities of Georgia rescued by the Court in *Gray v. Sanders*, 372 U.S. 368 (1963). It is quite understandable that none of the forty-nine states which originally adopted a system based in any degree upon local wealth has managed to eliminate wealth discrimination.

administrative convenience, if that. The State is in the embarrassing position of actually opposing the child's best interest in an activity—education—which the State regards so highly it has made compulsory. This conclusion may have no independent constitutional significance; however, it illuminates the absence of any compelling interest of the State that might justify the injury visited upon the children plaintiffs. *Shapiro v. Thompson, supra.*

(4) No interest of the state is threatened by fiscal neutrality which leaves vast discretion in the legislature.

The inquiry now becomes whether the present discrimination by district wealth is "necessary to promote a compelling state interest." *Kramer v. Union Free School District, No. 15,* 395 U.S. 621, 627 (1969). As the Court put it last term, ". . . [I]n all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of City of Chicago v. Mosley, supra,* at 2290. Discussion will be in three parts. First, we must identify the interest asserted by the defendants and evaluate its importance. Second, assuming the asserted interest is "compelling", we will inquire whether the present discrimination is necessary to its protection. Third, the spectrum of legislative options available under fiscal neutrality will be identified.

What Interest Does Texas Assert and is it "Compelling"? Defendants would justify the present system on the basis of an interest of the State in local control

over educational budgets. Just how the Texas law advances this objective is never specified; that it is so advanced appears to be merely assumed by the defendants. Their obscurity on this point is understandable. There would be grave difficulty in specifying just how the current structure qualifies as a *system* of local control. No doubt rich Alamo Heights enjoys this supposedly cherished State interest, but it would be a grim joke to speak of local control with respect to Edgewood. A more realistic description would be that Texas has created *two* systems—one centralized, one local. This is the purpose and effect of the foundation program itself. Once the poorer districts have complied with State-mandated programs at the guaranteed spending level, they have little if anything left, and even the size of that remainder depends upon the extremity of their poverty; the margin of local discretion in any event is so narrow as to approximate for them a centralized state system. It is the rich districts alone whose high spending provides the wide margin of discretion that justifies the label "local control".

The courts which have spoken to this issue have seen this plainly. Thus, in regard to the similar Minnesota system the district court remarked:

> Whether this interest of the State is constitutionally compelling . . . need not be decided. . . . By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so

> arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible. 334 F.Supp. 876.

See also *Serrano v. Priest,* 5 Cal.3d at 611, 487 Pac.3d at 1260.

That the State's interest is in confining local control to the rich is actually conceded by appellants: "[The System] leaves it to individual districts to go beyond that minimum as their desires and resources permit." Brief of Appellants at 6.

Amici note that the defendants also assert an interest of Texas in maintaining local autonomy over non-fiscal matters. There is little in the record concerning the present degree of freedom in educational policy accorded the Texas districts by the State, and it is difficult to comment. Amici, however, willingly assume that Texas has such an interest and protects it in practice; control over such matters is not here at issue. Obviously fiscal neutrality would in no way affect autonomy in non-fiscal matters, except perhaps, as noted, to make it possible for the first time for all districts to enjoy a margin of discretion over and above State-mandated programs.

Wealth Discrimination is Not Necessary to Local Control. Let us now assume that Texas truly wishes to establish local control over spending. Would the rule below interfere? Is spending by district wealth the only means of maintaining the supposedly

cherished autonomy? By no means. As we shall show in the next section, an endless variety of decentralized fiscal systems would comply. Again the *Van Dusartz* opinion clearly states the matter:

> The second reason for ignoring the question of whether the State's interest is compelling is that, under the constitutional standard here adopted, if the state chooses to emphasize local control, it remains free to do so to whatever degree it wishes. In fact, it is the singular virtue of the *Serrano* principle that the State remains free to pursue all imaginable interests except that of distributing education according to wealth. The State makes the argument that what plaintiffs seek here is uniformity of expenditure for each pupil in Minnesota. Neither this case nor *Serrano* requires absolute uniformity of school expenditures. On the contrary, the fiscal neutrality principle not only removes discrimination by wealth but also allows free play to local effort and choice and openly permits the State to adopt one of many optional school funding systems which do not violate the equal protection clause. 334 F. Supp. at 876-77.

The court below (and the other courts which accept fiscal neutrality)[8] likewise gave uncompromising approval to local choice concerning spending. The banks and bond counsel—amici for defendants—recognize that local choice would be unimpaired. The authors who suggested the test did so precisely because they

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[8]With the possible exception of the New Jersey Court deciding *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

cherish local choice and wished at last to see it realized, *Private Wealth,* at 202-03; far from seeking to centralize choice they have even urged that the family itself be permitted to play a greater role. Coons and Sugarman, *Family Choice in Education,* 59 Calif. L.Rev. 321 (1971). Critics who prefer centralized decision have complained for the very reason that fiscal neutrality encourages local choice. Wise, "School Finance Equalization Lawsuits: A Model Legislative Response", 2 Yale Rev. of Law and Social Action 123 (1971); Karst, *supra;* Berke and Callahan, *"Serrano v. Priest,* Milestone or Millstone", 21 J. Public Law 23 (1972). It is difficult in the face of all this to grasp the point of the endless remonstrations of defendants and their amici in favor of keeping local choice constitutional. Apparently everyone on both sides is in agreement on this point. However, lest doubt remain amici hereby embrace and commend to the Court the ringing declaration of defendants' brief:

> To impose on Texas and the other states a constitutional straitjacket that would prevent localities from spending additional sums on education as they see fit would destroy the important value of local autonomy and would have dangerous consequences for the public schools. Brief of Appellants at 6.

What strange manner of justification the present system has inspired. Its defenders praise it for the quality it lacks and reject the very principle which could make those qualities flourish.

The Variety of Legislative Options Exemplified. Far from imposing a "constitutional straitjacket" the

holding below liberates the legislature from its current straitjacket to consider on the merits whatever otherwise valid criteria for spending it chooses; it is forbidden only to allow district wealth to affect spending. Different amounts per pupil could, for example, be based upon any of the following factors: the level of district tax efforts; age or grade differences; intellectual gifts of a child; level of a child's achievement (high or low); cultural disadvantage; curriculum differences; area cost differences; transportation needs; experimentation; and reward for district efficiency.

If the legislature permits the first of these spending criteria—local tax effort—to operate, it has adopted a decentralized system, probably what school finance people have lately called *"district power equalizing"*;[9] if local effort is not permitted to vary then the legislature has chosen *"full state assumption."* Each

[9]As we will make clear in describing "district power equalizing", it is usually seen as a plan designed to make districts constructively equal in taxable wealth (i.e., through "state aid"). Of course they could all be made *actually* equal in wealth and could be left on their own to fix the local tax and raise *all* their own revenue. Spending would then be totally a function of local voters' preferences; by their nature districts would be power equalized regarding public education. And districts could in fact be made very nearly equal in taxable wealth by a number of common techniques. One is the removal of industrial, commercial, and mineral property from the school district tax base; it is the clustering of such property that currently produces the freakish differences in district wealth. Another available approach to tax-base equalization is the familiar tool of redrawing district lines. A combined application of these two techniques by the legislature could approach a system of quintessential local control—all local tax, locally chosen, and locally spent with each district enjoying equal capacity.

of these two general "solutions" is fully consistent with spending differences among districts, schools, and children, based by the legislature (or its district delegate) upon any or all of the other nine factors listed (plus many others). For example, neither full state assumption nor district power equalizing implies either the existence or lack of special programs and aid for educationally needy children. Such programs will exist or not as a result of a state (or district) decision independent of full state assumption and district power equalizing. In short, the two "solutions" only describe part of any school finance package.

Defendants have attacked both full state assumption and district power equalizing on policy grounds. Amici will defend neither as the "best" solution; obviously they represent opposing value judgments sincerely held by intelligent men. One would emphasize the virtues of a uniform policy; the other would create variety and local autonomy. What is plain, however, is that each represents an approach—unlike the present system—both feasible and evenhanded.

The many possible variations of full state funding are easily imagined. It may, however, be helpful if amici briefly illustrate how district power equalizing might be given effect in a simple system. (The figures used are arbitrary and might or might not be realistic in any given state.) Suppose that, from general statewide revenue the State provides a flat grant of $500 per elementary student for every district. The State also invites the districts to add to this $500 in the following manner: For every "mill" ($.001) it levies

upon local property the district may *spend* an additional $25 per child. Thus a district wishing to spend $1,000 per pupil would levy at 2% (20 "mills" × $25 = $500 add-on); a district wishing to spend $1200 would levy at 2.8% (28 mills × $25 = $700 add-on). This level of spending would be made possible through the traditional form of subvention to those districts with property wealth less than $25,000 per pupil; for example, a district with $15,000 market value per pupil would raise only $15 per child with each added mill and thus would qualify for a $10 subvention. Districts, if any, above $25,000 in wealth would generate a surplus with each mill; this surplus could not be spent locally and would provide a portion of the subventions.

The result is what Secretary Richardson has described as the "American ideal of labor rewarded". Address to the United States Conference of Mayors, June 20, 1972. Each district making the same tax effort would spend at the same level, but each would be free to choose its own level. All that would be altered in the present system is the opportunity of wealthy districts to spend more for a *lower* tax rate. Under this "district power equalizing" system, those who wished to spend more could continue to do so—but now all would be on the same tax terms.

Defendants seem to argue that a neutral decentralized structure of the sort described is not feasible —that the only living option is that between the existing dispensation and full state funding (Brief of Appellants at 44-47). They offer three kinds of arguments

for such a curious conclusion: District power equalizing is unpopular; it has disadvantages; it is unconstitutional.

The popularity of "district power equalization" is relevant only to show that it is a reasonable alternative, now undergoing serious consideration as a system of school finance. In fact district power equalizing has strong support; in California, for example, an elaborate legislative study has recommended it.[10] The President's Commission on School Finance felt that power equalizing was one of the methods "deserving of most serious consideration", supra at 31.

The substantive flaws in power equalizing alleged by defendants are three. First, it is said that the same tax rate for the same spending may be ". . . a heavier burden in an urban district, where other taxes are high". (Brief of Appellants at 45) This is true, but, a legislature is, of course, free under the *Rodriguez* standard to make adjustments in the power equalizing formula to account for those variations in the burden it perceives. See *Private Wealth*, at 232-42.

The defendants' second objection relates to the factor of "marginal utility" and may be handled in precisely the same fashion as the first—should a legislature desire to do so. Indeed, there is no counsel of

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[10]See California State Senate Select Committee on School District Finance, Final Report, June 12, 1972 (Charles S. Benson, Staff Director) (In press, California State Printing Office) pp. 225-235 (in ms.). (hereinafter "Benson Report") See also, The Urban Institute, Paying for Public Schools: Issues of School Finance in California (1972).

economic perfection that may not be given expression in the adjustments of a power equalized system. As Professor Michelman puts it, under district power equalizing, ". . . [A] marvelous group of variations, refinements, and qualifications are available to make the system respond to all manner of imaginable state policies." "Foreword: On Protecting the Poor Through the Fourteenth Amendment", 83 Harv. L. Rev. 7, 51 (1969).

Defendants' other substantive objection is that poor districts ". . . would be under great pressure to tax themselves at a high rate in order to receive the maximum state aid . . .", and thus will stint other public services (Brief of Appellants at 45). Since the poor districts today typically tax themselves at high rates for education, it is difficult to treat this objection seriously. It would be at least equally credible that poor districts now would reduce their educational rate, freeing money for other municipal services, because they could now do so while still spending at the old level or even higher. If they chose not to change rates, however, they would be no worse off in their ability to support other public services and—in a system based upon tax effort—would for the first time be rewarded for their dedication to education. Defendants assert that district power equalizing ". . . does not . . . provide equality without sacrificing freedom" (Brief of Appellants at 45). We would be grateful to learn what freedom has been lost when a poor district presently awash in a sea of taxation is given the choice of maintaining or even raising its school spending at a lower tax rate.

As to the constitutionality of district power equalizing the answer is simple indeed. The only objections on this ground have come from constitutional egalitarians who would "homogenize" district spending by judicial fiat and who argue that the problem with the *Rodriguez* standard is that it allows the state too much freedom. See the articles cited in Brief of Appellants at 46. Seemingly the theory of such critics involves two steps. First, if education is truly a fundamental interest, children prima facie should not be subjected to the varying choices of voters in their district; second, the state's interest in permitting local choice is not by comparison "compelling". Of course, this argument simply ignores all the many advantages to school children that arise out of and depend upon local control. In any case, however, this Court has given any such notion its quietus with the ringing endorsement of local control of schools in *Wright v. Council of City of Emporia,* 92 S.Ct. 2196 (1972).

Maintaining local control through district power equalizing, or some other fiscally decentralized system, offers the legislature an opportunity to give flesh and reality to the grass roots democracy cherished in American political and constitutional theory, but sometimes—as in Texas—reserved in reality only for some. In the words of this Court, neutrality in financing ensures "that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services. . . . It gives them a voice in decisions that will affect the future development of

their own community." *James v. Valtierra,* 402 U.S. at 143. See also dissenting opinion of Burger, C.J. in *Wright v. Council of City of Emporia, supra* at 2211.

The *Van Dusartz* opinion applied this language of *Valtierra* to the school finance problem: "Valtierra actually supports the 'fundamentality' of the interest in education. The Court there emphasized the special importance of the democratic process exemplified in local plebiscites. That perspective here assists pupil plaintiffs who ask no more than equal capacity for local voters to raise school money in tax referenda, thus making the democratic process all the more effective." 334 F. Supp. at 875, n. 9.

If doubt should remain as to the constitutionality of district power equalizing the Court need only affirm the decision below to end it. It will "be buying future litigation" (Brief of Appellants at p. 46) only if it gives plaintiffs a result they have neither sought nor been offered.

To repeat, local control of budget is merely valid and not constitutionally necessary. The state would remain as free as today to centralize decision making in whole or part. However, it should be clear that the term "centralization" has no single meaning, and that full state assumption does not automatically terminate all local choice. The legislature could provide all the money the districts spend and yet, to the degree desired, leave the districts free in terms of curriculum, teacher certification, and other aspects of administration. That this is a likely possibility is shown by an Urban Institute study of a number of states which

revealed "no important differences in the degree of local administrative control associated with differences in the degree of state financing". Bateman and Brown, "Some Reflections on Serrano v. Priest," 49 J. Urban L. 701, 704-05 (1972). Even in fiscal matters districts functioning under full state assumption may be given varying degrees of discretion in determining the actual use of whatever funds are given them by the state. Indeed, even though a state provides all funds from the state level it may yet encourage very substantial decentralization by delivering the money directly to the school rather than to the district as recommended by the New York State Commission on Elementary and Secondary Education.

Defendants have spoken loosely of discouraging experimentation in education and "leveling down" of spending, and perhaps a last word is in order to make the issue of spending differences absolutely clear. If it be important to Texas to continue even the present highest levels of spending (for example, in order to encourage experimentation), it is perfectly free to do so. All that is required is that the fortunate districts be selected upon some non-invidious and rational basis. Many such criteria can be imagined. District wealth, however, is not among them.

PART III. AFFIRMANCE RAISES NO SERIOUS ISSUES OF ACHIEVING COMPLIANCE

Affirmance of the judgment below will not involve the courts in a prolonged and vexing monitoring of complex state systems. Nor will the judiciary ever be required to make judgments concerning educational policy or the allocation of revenues to competing educational uses. There are several reasons to be confident of this. One is the essential modesty and simplicity of the *Rodriguez* standard which even critics concede to be "judicially manageable". Brest, Book Review, 23 Stan.L.Rev. 591, 592 (1971). Fiscal-neutrality is an objective economic test with little of the frustrating ambiguity of "racial discrimination" or "obscenity;" nor does it constrict legislative discretion as much as it broadens it.

Nevertheless, to insure compliance even the clearest and most restrained standards may require either public acquiescence or judicial enforceability. See Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined", 35 U. of Chi. L.Rev. 583, 597-98 (1968). The *Rodriguez* result enjoys both, as amici will shortly suggest. In considering remedy it will also be important to bear in mind that state courts have already manifested willingness to share the burden of enforcement. *Serrano v. Priest, supra; Hollins v. Shofstall,* Civ. No. C-253652 (Super. Ct., Maricopa County, Ariz. Jan. 13, 1972); *Sweetwater County Planning Comm. for the Organization of School Dists. v. Hinkle,* 491 P.2d 1234 (Wyo. 1971), 493 P.2d 1050 (Wyo. 1972); *Robinson v. Cahill, supra.*

Compliance is assured by a widespread public and official support. As one critic has observed, the judicial action coincides with a "growing public eagerness for its result" (Goldstein, "Interdistrict Inequality in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny," 120 U.Pa.L.Rev. 504 (1972)), an attitude shared in official circles. The California reaction is a good example of what may be expected. There, two of the major defendants in *Serrano* (men of opposite political parties) have embraced the outcome; both the State Superintendent of Public Instruction and the State Controller appear here as amici in support of the result below. See amicus briefs of Riles and Flournoy. Numerous bills before the present session of the California legislature represent favorable responses to *Serrano*. See e.g., A.B. 1283; S.B. 1351. The State Senate has appointed a select committee with a $120,000 budget to develop alternatives that do comply. Senate Rules Committee Res. 505, adopted October 6, 1971. That committee's staff has now reported a set of alternatives which meet the standard. See Benson Report. Meanwhile an initiative known popularly as "The Watson Initiative" has won a place on the November ballot by petition with over 575,000 signatures. Sec. of State, official count. Given 1971-72 district wealth statistics, the Watson Initiative would comply with *Serrano* in every respect other than a very slight wealth discrimination favoring approximately 1100 students (out of four million) in two rural counties.

The national scene is similar. The Secretary of Health, Education and Welfare has praised the *Rodri-*

guez decision, stating: ". . . [w]e have for too long tolerated a system through which we raise money for schools unfairly. . . [w]e have for too long distributed money for schooling in a manner that mocks the American ideal of labor rewarded . . ." Address to the U.S. Conference of Mayors, June 20, 1972.[11]

The President's Commission on School Finance; the United States Commissioner of Education (N.Y. Times, Sept. 1, 1971, at 17, Col. 1); the "Fleischmann" Commission in New York (See Report of the New York State Commission on Quality Cost and Financing of Elementary and Secondary Education); and a gubernatorial commission in Michigan (See School Finance Reform in Michigan (1971)) all have given unreserved support. Governors from a number of

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[11]The rest of the Secretary's language is noteworthy:

Simultaneous with the burgeoning financial crisis, the courts—in Texas, California and elsewhere—have taken actions that may force us at long last to alleviate the terrible inequities deriving from our traditional over-reliance on local property taxes as the principal source of public school education funding.

But in handing us that challenge, I believe the courts also have presented us with a moral mandate—a mandate to achieve true equality of educational opportunity.

The California Supreme Court, upholding the plaintiff in the first successful challenge of a property tax-based school financing system, caught the very essence of this inequity when it wrote:

> "Affluent districts can have their cake and eat it too; they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."

I believe we have for too long tolerated a system through which we raise money for schools unfairly, placing excessive burdens on property owners and renters.

And I believe we have for too long distributed money for schooling in a manner that mocks the American ideal of labor rewarded, since certain communities must sacrifice twice as much as others for less than half the results.

Therefore, I am personally hopeful that the Supreme Court will uphold the U.S. District Court in the San Antonio case.

states have supported the plaintiffs as amici curiae in this very appeal. Even the Texas banks and security dealers and the nation's leading bond counsel —ostensibly amici for the defendants—have refused to criticize the result, seeking only to avoid retroactive effect, Brief of Republic National Bank of Dallas et al. at 2; Brief of Bond Counsel at 30-31. Finally, the Texas State Board of Education has pledged itself to prepare a plan complying with the *Rodriguez* rule when the decision is affirmed. (N.Y. Times, Jan. 9, 1972, at 62, col. 1).

Given this support and/or acquiescence the very affirmance of the decision below would itself constitute the most significant step toward enforcement; such a declaration of principle would automatically alter the balance of power in favor of legislative compliance. There are structural and historical considerations which further support this prediction. In the past the system has been impervious to legislative reform principally because of the self-interest of districts of moderate wealth. See *Private Wealth* at 292-94, 454. Such districts have had little to expect from reform; to the contrary, since most "reformers" historically have promoted centralizing solutions, these districts rightly have feared loss of local control. See e.g., Wise, *Rich Schools, Poor Schools* (1968); *McInnis et al. v. Shapiro et al.*, 293 F.Supp. 327 (N.D. Ill. 1968).

Rodriguez would alter this perception of district self-interest by preserving the State's power to decentralize budget decisions. Middle-wealth districts will be encouraged by the standard adopted below to enter

the legislative debate and to stump for prompt and reasonable forms of compliance which establish local control for the first time on a fair basis. This political support by the middle-wealth districts for prompt legislative compliance should be decisive. Such an outcome should also be assisted (if quite adventitiously) by the powerful concerns of taxpayers. Professor Karst nicely summarizes the probable result of these factors: "A new legislative alliance, teaming poor districts with districts that are neither poor nor wealthy but whose residents now sense the possibility of tax reform, seems likely to emerge." Karst, *supra,* at 752. There seems little prospect that the judicial stick will ever prove necessary to secure compliance.[12]

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[12]Even assuming legislative resistance, in no instance need the courts intrude into the administrative or educational judgments of school districts. They would be spared both the abrasive and highly contingent judgments involved in racial desegregation and the application of an extremely confining rule to the legislature itself, as in reapportionment. *Rodriguez* will never require courts to allocate resources to specific educational uses or even to specific institutions as in *Hobson v. Hansen,* 327 F. Supp. 844 (D.D.C. 1971).

After all, the evil here identified is not differences in expenditure; rather, it is differences in taxable resources. As to this, the court has a number of ready, simple, and effective initial remedies. We will describe one in detail. It would simply restrain the local authorities from mingling educational tax revenues derived from industrial and commercial property with educational revenues derived from residential property. The industrial and commercial revenues from all districts (or selectively) might be sequestered abiding the introduction of a new system; better, perhaps, this pool could be declared available to the state for all purposes consistent with the constitutional standard. It would be very useful to the state, for example, as a support for a temporary program of expanded equalization during any switchover period in which residential property served as the local base (more districts would now qualify for foundation aid). Most im-

CONCLUSION

This Court should affirm the holding of the three judge district court that the Texas system for financing public elementary and secondary education is invalid, specifically because it makes the level of spending for any child's education a function of his

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portant, however, district differences in taxable wealth per pupil would have shrunk to a small fraction of their previous range.

Compliance with such an order would be simple for the court to monitor; real property is already classified in Texas. Records thus would disclose all the information needed. Further, the court could enlist the aid of plaintiffs in identifying improper allocations of collections or reclassifications of property.

This first step would represent a basic amelioration of fiscal discrimination without visiting serious structural injury upon the Texas system. Districts would continue to operate as independently as before *Rodriguez;* further, because of the Texas equalization program, all districts could continue to enjoy that measure of expenditure which the defendant's Jurisdictional Statement describes as "intended to assure every child in the state of at least a minimum foundation education." (Jur. St., p. 5).

Finally, it should be noted that the tax roll may be split in additional ways to approach full compliance more closely. The court might, for example, order the sequestration of collections from all multiple-family dwellings and/or from properties exceeding an absolute market value—e.g., $75,000. This latter approach—excluding highly valuable properties from the local base—might be useful to ameliorate the effect of extreme concentrations of purely residential wealth. Such districts would remain unaffected by the separation of only industrial and commercial property.

Note that in all these cases no individual tax bills would be affected in any way by the decree; nor would the court be forbidding any district to spend what it pleases if it were merely willing to impose additional taxes in the manner historically familiar to poor and average-wealth districts. Meanwhile no district would fall below the minimum spending level now approved by the State.

Splitting the tax roll is but one example drawn from the arsenal of appropriate remedies available to state and federal courts within their traditional equity jurisdiction. Some remedies clearly would be more intrusive than others, but none need substitute the judgment of the court for that of educators in allocating funds to particular uses, and none need involve the court in imposing new taxes.

school district's wealth. The matter should be remanded to the district court for consideration and determination of the time and character of whatever action, if any, is necessary and proper to secure compliance in addition to the order of that court in this case dated December 23, 1971.

Dated, August 18, 1972.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether Article VII, §3 of the Constitution of the State of Texas and the sections of the Texas Education Code relating to the financing of public education violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Plaintiffs, who are the appellees, are parents and children residing in the Edgewood Independent School District, which is located within the city of San Antonio and Bexar County, Texas. Plaintiffs represent the classes of all other children and parents of Mexican-American descent who live in the Edgewood Independent School District, all children and other persons living in the Edgewood Independent School District, and all other children and parents living in Texas independent school districts, who are members of minority groups or who are poor. Defendants are members of the State

Board of Education, the Commissioner of Education, the Attorney General of the State of Texas, and the Bexar County School Board Trustees.

Plaintiffs allege, and the Trial Court held, that the Texas system of financing public elementary and secondary education violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against plaintiffs and the classes they represent. That system makes educational expenditures a function of the wealth of the family and of the district, and ensures that poor and minority group children will be afforded an inferior opportunity. This discrimination is accomplished through a combination of local property taxation, which allows districts with high property values to raise more dollars for education than districts with low property values (at lower rates of taxation), and a state Foundation School Program (formerly entitled Minimum Foundation Program) which fails to compensate for the inequalities in fiscal capacity among school districts.

The Trial Court held that the Texas school financing system discriminated against children living in poor districts and declared unconstitutional the Texas financing system as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It enjoined enforcement of the Texas laws on the financing of education "insofar as they discriminate against plaintiffs and others on the basis of wealth other than the wealth of the state as a whole." (A. 273). It stayed its mandate for two years in order to give the Defendants and the Legislature an opportunity to take all steps necessary to make the financing system compatible with the Fourteenth Amendment. (A. 273).

SUMMARY OF ARGUMENT

The State of Texas has set up a state-wide system of public education pursuant to Art. VII, §1 of the Texas Constitution. It has created school districts, defined their boundaries and allowed property values in each district to effectively determine the amount of money available for education of the children in the district. In Texas, children must attend school. Texas Education Code, §21.032. In this manner the State has made the quality of education a child in Texas receives the function of the wealth of the district in which the child resides. Property values in districts vary widely, ranging from $500,000 of property per student to less than $10,000 per student. Because of these disparities in district wealth, the education provided in the schools in poor districts is vastly unequal to that provided in affluent districts. See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); and *Missouri ex rel Gaines v. Canada*.

Plaintiffs contend education is a fundamental interest. Plaintiffs further aver the discrimination against people living in poor districts, the poor and minorities, constitutes a suspect classification. The weight of this discrimination falls upon helpless children and the State has come forward with no compelling or substantial justification for its discrimination.

Plaintiffs further contend that the Texas system does not bear some rational relationship to a legitimate state purpose. The defendants urge rationality on the ground the system permits local determination of the amount of money to be spent on the basis of parental motivation. The evidence shows in fact that in Bexar County and state-wide the poor districts make the highest tax effort (tax at the highest equalized rates)

and have the least revenues, while the wealthy districts tax at the lowest rates and have the most revenues. The result is the districts making the highest effort afford the lowest quality of education, while those districts making the lowest effort are able to afford the highest quality of education in Texas.

PART A ARGUMENT

1. BACKGROUND OF LITIGATION

Suit was filed on July 10, 1968. A Three Judge Court was duly convened, preliminary hearings relating to parties were held, and amendments of pleadings were filed which added parties and which responded to defense motions for a more definite statement. Thereafter, defendants filed a Motion to Dismiss challenging the allegations in the complaint on the ground plaintiffs failed to state a cause of action. The Trial Court overruled the Motion to Dismiss on October 15, 1969.

The defendants continually assured the Trial Court that the Legislature of Texas would address itself to the school finance problems raised by this case. At a hearing before the Trial Court held on October 2, 1969, plaintiffs sought prompt trial contending that the suit and the report of the GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION (1968) (Plaintiff's Exhibits XVIII a-i cited in Appellant's Brief at pp. 10 and 11, hereinafter referred to as Report of the Governor's Committee) were known to the Legislature which convened in January and adjourned in May, 1969 and that the 1969 Legislature had failed to act.[1] Defendant's position after the 1969 session was

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[1]Plaintiffs introduced the testimony of State Senator Bernal that in his opinion the Legislature would not act in this century. (Docket #133).

that the Legislature had an obligation, duty and responsibility to work on the matters of which plaintiffs complain and that the Legislature would make changes and would take action if trial were delayed. (Hearing, Oct. 2, 1969, Docket #134, page 24, ll. 14-18). The Trial Court was familiar with the Report of the Governor's Committee and stated in its Order of October 15, 1969, that it was aware the Legislature had authorized the appointment of a committee to study the Public School System of Texas and to recommend legislative action. (A. 269). On the basis of this information, the Court held trial on the merits in abeyance, pending action by the 62nd Legislature convening in January, 1971, and directed defendants to advise the Court and plaintiffs, at least once each 90 days, of the progress being made by the Committee and the Legislature with respect to this matter. (¶8, A. 41-42).

The Trial Court's concern for legislative action was further demonstrated by the Court's Show Cause Order relating to the failure of defendants to file progress reports on the actions of the Legislative Committee as required by the Court's October 15 Order. (Docket #140). It was agreed in the Pre-Trial Order (¶32, A.55) and in open court that the 62nd Legislature convened in January, 1971, and adjourned at the end of May, 1971, without taking any action with respect to the issues raised by this case. (A. 269). This inaction prompted Judge Adrian Spears to make the following remarks:

> I think it is a little disconcerting to a Court, when it abstains and does it on specific grounds that it wishes for the Legislature to do something about it, and with education as important as it is to the citizenry of our State and our Nation, for the Legislature to completely ignore it, it makes you feel that it just does no good for a court to

> do anything other than, if it feels these laws are suspect, declare them unconstitutional; then make the Legislature take action, which they don't seem to want to do unless they are forced to do it.

Hearing before Court held December 10, 1971, p. 24.

Contrary to defendants' inference that the State of Texas has constantly reviewed and revised its school finance procedures, there has been no educational reform in Texas since 1949. (¶48, A. 57; Report of the Governor's Committeee, Exhibit XVIIIa, p. 20; Graham Deposition, p. 27, ll. 12-16). The 1969 codification of the Gilmer-Aiken Act, carried over the school financing law practically verbatim, including some provisions relating to segregation. (A. 287, 291). Thus, despite the defendants' intransigence and its unwillingness to offer the poor an equal educational opportunity, the Trial Court acted with care, as well as restraint. It gave defendants ample opportunity to respond through the legislative process to plaintiffs' grievances. Moreover, when the lower court declared unconstitutional the Texas school financing plan, it allowed the State of Texas two additional years to put its house in order.

2. THE RECORD

The Trial Court in its 1969 Order allowing two years for the Legislature to act also ordered the parties to proceed with preparation for pre-trial and trial, giving that additional time to prepare for trial. The record is clear and complete. It contains the testimony of nine witnesses and 19 exhibits, including graphs, charts and reports. The evidence presents a full picture of the operation of the Texas education system in both narrative and statistical form. The statistical evidence is derived primarily from information supplied by the Texas Education Agency and from the Report of the

Governor's Committee.

Listed below are plaintiffs' witnesses including the primary thrust of their testimony. Most of the direct testimony of plaintiffs' witnesses was prepared in narrative form and submitted to defendants' counsel on October 5, 1971. Their depositions were taken between October 6, 1971, and October 20, 1971, at which time the respective narrative statements were formally introduced as a portion of the testimony of the witnesses. This narrative testimony is contained in the Appendix at pp. 193-258.

Witnesses:

Dr. Joel Berke, Director of Education Finance and Governance Program of the Policy Institute, Syracuse University, The Texas School Financing System (Docket #173, A. 193)
Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District: The Effect of Inequitable School Financing. (Docket #176, A. 234).
Dr. Don Webb, Associate Professor of Economics, Trinity University: Local School Financing. (Docket #175, A. 222).
Dr. Daniel C. Morgan, Jr., Associate Professor of Economics, University of Texas at Austin: State Financing, Minimum Foundation Program. (Docket #181, A. 241).
J. Richard Avena, Director of the Southwestern Field Office for the U. S. Commission on Civil Rights: Discrimination Against Mexican-Americans. (Docket #180, A. 231).
Dr. Charles Feldstone, Director of Computer Program, Trinity University: Per Capita and Family Incomes. (Docket #175).

Plaintiffs' exhibits were introduced on October 5, 1971, and are identified in Appendix A of this Brief. Defendants introduced the depositions of Dr. J. W.

Edgar, a Defendant, the Commissioner of Education (Docket #179), Dr. John Stockton (Docket #178), and Leon Graham (Docket #177).

Defendants have largely ignored the record in the case. Rather, they rely upon hearsay material not introduced in evidence, including statistics from states other than Texas. For example, defendants attack the testimony of Dr. Berke, who was cross-examined at trial, by referring to an article not subject to cross-examination. (Appellants' Brief, pp. 21-22). After fully participating in a long and thorough adversary proceeding that contained the testimony of many witnesses and at least 100,000 pages of statistics and materials, defendant should not be permitted to retry the case before this Court with material that would not be admissable before the Trial Court. Their approach is contrary to the purpose of a trial, to the rules of evidence, and to accepted trial procedure.

3. The State Financing System

Article VII, §1 of the Texas Constitution mandates a public free school system. Pursuant to this mandate, the State of Texas has established a system of public schools, and it has created school districts for the convenience of the state in maintaining the public schools. (Stipulation 16, A. 53). State funds supporting the Texas system (the state financing system) come from two sources: (1) Ad Valorem property taxes assessed by local school districts, and (2) Foundation School Program Funds (including the Available School Fund). (Stipulation 18, A. 53). The state has delegated the power to each independent school district to levy and collect property taxes for maintenance and operation of their respective school systems, within statutory and constitutional limits. (Stipula-

tion 19, A. 54). Each independent school district levies and collects taxes on property within its district. (Stipulation 20, A. 54). The money collected by such districts must be used solely within the district in which it is collected under the requirements of Article VII, §3 of the Texas Constitution. (Stipulation 20, A. 54).

The State provides approximately 50% statewide of the public school education funds. This is done through the Foundation School Program and Available School Fund. The Foundation School Program formulas effectively determine the amount of funds a school district will receive from the State. (See Stipulation 21, A. 54). Distribution of state funds to local districts is made in a two-step process. First, the districts receive a per pupil uniform payment from the Available School Fund ($98 per pupil in 1968). The amount of each district's Foundation School Program entitlement is then calculated. Next, the amount of the Available School Fund payment is subtracted from the Foundation School Program and distribution of the balance of the Foundation School Program Funds is made from the State to the local districts. (Graham Deposition, p. 9, l. 18; Morgan Deposition, pp 44-45, p. 71 ll. 16-19). Thus, there are two separate payments, the Available School Fund payment and the Foundation School Program payment (reduced by the amount of the Available School Fund payment), the sum of which equals the amount due the local districts from the State under the Foundation School Program formulas. The Available School Fund is a revenue source, but plays no effective part in determining the amount of money the district receives.

The Foundation School Program has three major divisions: (1) Personnel salaries, (2) Maintenance

and operation, and (3) Transportation. More than 80% of the Foundation School Program (the State's outlay to the school districts) is for payment of teachers' salaries (A. 244). The teachers' salary schedules are a matrix, with the higher salaries going to the teachers with (1) the greater number of years of schooling and degrees, and (2) the greater number of years of teaching experience. (A. 244).

The more a local district puts into teachers' salaries, the more "qualified" its teachers will be according to State standards of qualifications. The more money a school spends on teachers' salaries, the greater its Foundation School Program allocation. The system is essentially an incentive matching approach to state aid. (A. 242). The wealthy district can pay higher salaries and thereby acquire more qualified teachers. The wealthy districts can also hire more teachers because they have more funds. (See A. 237). The Texas system thus enables the affluent districts to acquire "higher quality" teachers and more of them (A. 237) and thereby to qualify for more funds under the Foundation School Program than the poor districts. (A. 244).

The State pays 80% of the Foundation School Program costs and the local districts are responsible for the balance (the Local Fund Assignment). That balance is apportioned according to an economic index. As described by Appellants, this index apportions the local funding according to the wealth of the district.[1] Using a low tax base and a high tax base district as examples, a dollar comparison of this Foundation School Program will illustrate how the Local Fund Assignment works. The figures are derived from the

[1]The Trial Court recognized that the economic index has come under increasing criticism, including criticism in the Report of the Governor's Committee. (A. 260).

attachment to the Graham Deposition for the 1970-1971 school year.

District	Property Value Per Student	State Funds Per Student (Foundation School Program minus Local Fund Assignment 1970-1971)	State Foundation School Program Per Student 1970-1971
Edgewood	$ 5,429	$350	$356
Alamo Heights	$45,095	$393	$491

The above chart includes only State Foundation School Program Funds. It does not include the funds raised by the District's local tax paying capacity. The chart clearly shows how, notwithstanding the economic index, poor districts receive fewer dollars from the State than rich districts.

4. IMPACT OF THE TEXAS SYSTEM FOR FINANCING PUBLIC SCHOOL EDUCATION

The effect of this financing system is that in Texas the tax base of the local school district determines the amount of educational dollars received per child. Dr. Berke in his testimony found an almost perfect statewide correlation between the size of the tax base and the amount of educational dollars expended per child. To illustrate, portions of his testimony (A. 198-205) and of Plaintiffs' Exhibit VIII are reproduced below:

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	Equalized Tax Rates on $100	Local Revenues Per Pupil	State Revenues Per Pupil	State & Local Revenues Per Pupil
Above $100,000 (10 Districts)	$5,900	8%	$.31	$610	$205	$815
$100,000-$50,000 (26 Districts)	$4,425	32%	.38	287	257	544
$50,000-$30,000 (30 Districts)	$4,900	23%	.55	224	260	484
$30,000-$10,000 (40 Districts)	$5,050	31%	.72	166	295	461
Below $10,000 (4 Districts)	$3,325	79%	.70	63	243	305

The above exhibit further shows that the poor districts

are taxing at higher rates than the affluent districts. In fact, the evidence is irrefutable that in Bexar County, as well as throughout the State of Texas, the districts with the least revenue per student are making the greatest tax effort.

Moreover, poor people generally reside in poor districts. The foregoing exhibit supports the Trial Court's finding:

> As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor districts are poor in income and predominantly minority in composition. (A. 262).

In Bexar County (metropolitan San Antonio) this is shown in Plaintiffs' Exhibit III (A. 76) and Chart #2 (A. 227) below:

School District	Property Value Per Student A. 229	% Anglo-American	% Mexican-American	%Negro	Median Per Capita Income	Median Income Per Household
Edgw.	$ 5,429	3.88	89.66	6.30	$ 995.01	$4,686.53
S. San	9,974	41.21	56.90	1.37	1,357.62	5,091.09
Har.	10,468	38.50	61.36	.10	1,453.70	5,553.16
SAISD	19,659	26.71	58.52	14.48	1,493.33	4,928.87
N'rs'de	20,330	82.07	15.79	1.71	2,042.75	7,313.07
N'reast	27,317	91.99	7.38	.10	2,618.05	8,927.56
A. Hgts.	45,095	85.15	14.15	.42	2,807.59	8,001.64

The poverty of Mexican-Americans in Texas is shown. (A. 232). Plaintiffs' Exhibit X (A. 98) below, shows the statewide discrimination as to them:

EXPENDITURES PER PUPIL IN ADA IN TEXAS

Districts 10 percent or more Mexican American with total enrollment 300 pupils or more (Expenditures are from State and local revenue only)

Percent Mexican American of District Enrollment	Districts in Sample		Estimates for All Districts	
	Number of Districts	Per Pupil Expenditures	Number of Districts	Per Pupil Expenditures
10-19.9	55	$457	85	$444
20-29.9	38	484	59	477
30-49.9	32	444	49	444
50-79.9	39	377	60	382
80-100	23	292	30	297

Defendants argue that the evidence of Dr. Berke identifying the nexus between income and property values could be construed to show that the disparities between the very rich districts and the very poor districts are dramatic but not numerically significant. The argument defeats itself. Plaintiffs do not contend that the poor districts in Texas are other than a minority of the districts. This is shown in Plaintiffs' Exhibit VII. (A. 77).

Defendants, with income and wealth data available at all times, did not produce evidence that called into question the evidence of the plaintiffs. Now defendants indicate that these statistics may possibly point out some "state peculiarity" that results in the poor and minorities being in rural districts. (Appellants' Brief, p. 24). The foregoing chart on Metropolitan San Antonio, which has a population of approximately 850,000 people and is the residence of the plaintiffs refutes this contention.

The defendants' witnesses took the position that the poor districts have the poor people. Defense witness, Dr. Stockton, testified that a district's assessed valuation is a reasonably accurate measure of income within a district. (Deposition, p. 21). Mr. Graham, testifying for the defendants, stated that the poor districts have the greater numbers of disadvantaged children. (Deposition, pp. 49-50).

An illustration of how the Texas system works in Bexar County is found in the testimony of Dr. Webb (A. 222-230) and in the chart provided below. For each column the most recent figures in evidence are used. The seven school districts below have 93% of the public school students in Bexar County, and all are in the Metropolitan San Antonio (a single urban eco-

nomic area whose citizens reside and work within it). (A. 222).

District	Equalized Tax Rate 1970 A. 226	Property Value Per Student A. 229	Local Funds Per Student 1969-70 A. 175-184 et seq	Median Per Capita Income 1969 A. 227	State Funds Per Student (Foundation School Program Funds Minus Local Fund Assignment) 1970-71 Graham Deposition	State Foundation School Program Per Student 1970-71 Graham Deposition
Edgewood	1.05	$ 5,429	37	$ 995	$350	$356
South San	1.00	9,974	97	1,357	351	367
Harlandale	.89	10,463	84	1,453	Not provided	Not provided
SAISD	.76	19,659	160	1,493	361	407
Northside	1.02	20,330	144	2,042	370	401
Northeast	.90	28,817	239	2,618	362	423
Alamo Heights	.85	45,095	412	2,807	393	491

The Alamo Heights and the Edgewood Districts are here used for comparison. Edgewood makes the higher tax effort, taxing at an equalized rate of $1.05 per $100 valuation while the Alamo Heights rate is $.85. (A. 226). For the 1969-1970 tax year, Edgewood was able to raise only $37 per student in local taxes while Alamo Heights was able to raise $412 per student. The reason this disparity exists is because Edgewood has $5,429 of property per student and Alamo Heights has $45,095 of property per student.

The sums available for public school education are determined by local Ad Valorem property values. Dr. Cardenas notes that Edgewood's low tax base reflects a district that is mostly residential, having poor people living in poor housing (the average tax collection in Edgewood is $31.50 per annum) with an almost total absence of commercial property. Residential values assist a school, but all Texas districts necessarily rely heavily on revenues from commercial property to support their schools. (Cardenas Deposition, pp. 21-24).

It is effectively impossible for poor school districts to

raise the revenues per student that affluent school districts are able to raise since an increase in Ad Valorem taxes is the only means that poor school districts have to raise more revenues. This impossibility is described by Dr. Berke and in the following Tables (A. 206-207). The hypothetical yield relates to yield if highest tax rate is applied to all districts. The column indicating the tax rate needed to equal highest yield shows it is necessary for the average school in the poorest category to tax at 20 times the rate of the average school in the wealthy category to achieve the same tax yield.

Categories Market Value of Taxable Property Per Pupil	Tax Rate Needed to Equal Highest Yield	Hypothetical Yield of Highest Tax Rate Per Pupil
Above $100,000 (10 Districts)	$ .64 per $100	$2,356
$100,000-$50,000 (26 Districts)	1.49 per $100	918
$50,000-$30,000 (30 Districts)	2.58 per $100	519
$30,000-$10,000 (40 Districts)	4.88 per $100	292
Below $10,000 (4 Districts)	12.83 per $100	108

The defendants contend "this is not like *Hargrave v. Kirk*, 313 F. Supp. 944 (N.D. Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education." In Texas the maximum rate for school maintenance is $1.50 per $100 valuation. Texas Education Code, §20.04 (d). The poor districts, as shown above, would have to tax at several times that rate to make available the revenues available in wealthy districts. The Texas system makes it impossible for poor districts to provide quality education in fact as well as in law.

The Foundation School Program has little, if any, equalizing effect with respect to the variations created by the State's wealth classification. Dr. Daniel C. Mor-

gan (A. 241-242) states the Foundation School Program: (1) does not equalize the capacity of school districts to support education, (2) does not place a lower effective tax burden on the poor children, and (3) does not mandate some level of either education per child or money expenditure per child. Additionally, as Dr. Joel Berke testified and the court below held, whatever mild equalizing effect that state aid may have, it does not operate in favor of the poorest districts. (A. 206, A. 262).

5. Minority Group Discrimination

The minority group discrimination recognized by the Trial Court (A. 262) is substantiated by the evidence. Separate schools for minority children were long a part of the Texas system. Mr. Richard Avena, Director of the Southwestern Field Office of the United States Commission on Civil Rights, (A. 231-233) summarizes the discrimination that has long existed against Mexican-Americans in Texas. He testified that there was discrimination in the fields of education, housing, employment and civil rights. In some areas of Texas, separate schools have been provided for Mexican-American students. (Deposition, Edgar, p. 10). The state education agency was enjoined from participation in the segregation of Mexican-Americans at the time Dr. Edgar joined the agency. (Deposition, Edgar, p. 11). This segregation in housing and education is reflected in the distribution of education dollars. All relevant evidence substantiates plaintiffs' contention that the districts with the highest percentages of Mexican-Americans and Blacks are low expenditure districts, while those with few minority people spend substantially more per student for education. Statewide it is shown at A. 198-200, and in Exhibit X:

Expenditures Per Pupil in A.D.A. in Texas in Districts with 10% or more Mexican-American enrollment, at A. 98 (also introduced as Berke, Chart #1, A. 203) and in Bexar County the parallel is shown in Plaintiffs' Exhibit III, A. 76, and Table VII, A. 216.

It is no historical accident that 90% of the school children in Edgewood are Mexican-Americans and Edgewood is the poorest district within metropolitan San Antonio. Mr. Avena testified this is the result of state-enforced Deed restrictions that barred Mexican-Americans from any but the poorest neighborhoods (A. 232) prior to *Shelley* v. *Kraemer*, 344 U.S. 1 (1947). See also, Title 42, U.S.C. §3601, et seq. (Fair Housing Act of 1968).

The defendants assert two propositions to justify the present Texas system:

1. The Defendants contend that the Texas system assures each student a minimum educational program.

2. Defendants contend that money does not make a difference in the quality of education a school can provide its children.

Plaintiffs here review the evidence relating to the foregoing contentions in the above order.

6. The State Foundation Program Does Not Assure A Minimum Educational Program

The Foundation School Program is a means of delivering dollars to the schools in a way that will assure the wealthier districts greater funds per pupil. (A. 196, A.242, A. 262). It does not relate to an educational program and it does not assure any minimum. (A. 242-243). The system provides in an incentive manner a portion of the teachers' salaries but it does not assure a district any particular number or quality

of teachers. The State Foundation School Program of financing does not relate to general educational quality or physical facilities for education. Indeed, the State does not maintain data on the courses offered in the schools (A. 136), dropouts and withdrawals (A. 120-121), teaching aids and equipment (A. 145), extra-curricular activities, such as music, drama, and art (A. 146), hours of education (A. 146-147), educational achievement (A. 154), physical plant and teaching facilities (A. 129 and A. 146). Both Dr. Morgan and Dr. Berke testified that the State does not provide a minimum educational program. (Dr. Morgan: A. 242-245, Deposition, pp. 43 & 52, l. 7, et seq.; Dr. Berke, Deposition, Answer 17, p. 9, Answers 48-51, pp. 22-24, Answers 88-89, pp. 41-42).

The minimum the defendants referred to at trial is merely the least amount any school raises or receives from the State. (Morgan Deposition, p. 49, l. 16 – p. 50, l. 2, and p. 43, ll. 9-18). Defense counsel made clear in his cross-examination of Professor Morgan that the minimum provided by the program is whatever the school at the "bottom" receives:

> "Q. Well, everything on the bottom has got to be equal, hasn't it, Dr. Morgan?"
>
> "A. If you are asking me . . . if there is some amount in every district, almost all the 1200 districts have some amount of money down there – and that is about it."
>
> "Q. That's the minimum, isn't it?"
>
> "A. If you want to define that as a minimum the answer is 'yes'." (p. 53, ll. 9-18).

7. THERE IS A CORRELATION BETWEEN MONEY AND THE QUALITY OF EDUCATION A DISTRICT IS ABLE TO PROVIDE ITS STUDENTS

Defendants deny that dollars spent on education

have anything to do with the quality of education which a school will be able to offer poor children. No evidence was introduced at trial to support this contention, while both plaintiffs and defendants introduced evidence which showed the correlation between money and quality in education.

The State, defendants' counsel, and defendants' witnesses have maintained that money makes a difference. The State by its own actions asserts that money makes a difference in the quality of education a school is able to provide. (Report of the Governor's Committee, pp. 14, 40 & 58-76; Morgan Deposition, p. 59, l. 15, p. 63, p. 66, l. 21, p. 67, p. 68, ll. 10-17). The State set up the Foundation School Program that puts more than one billion dollars annually into the Texas public school system. (¶ 40, A. 56). The State program is designed to pay more money to teachers in order to get higher quality teachers (Chapter 16, Texas Education Code; A. 294-305; A. 326-327; A. 244). The State has created a system to permit local districts to put another one billion dollars into the state education system.

Defendants' witnesses, employees of the State, acknowledged the correlation between money and quality. (Edgar Deposition, p. 15, ll. 7-15; Graham Deposition, p. 46, ll. 3-19). They mention that other factors also relate to the quality of education a school is able to provide. Dr. Edgar states that other factors include qualifications of teachers, capacity and abilities of the administrators, and the adequacy of the facilities. (Deposition, p. 15). It is apparent, as plaintiffs' witnesses testified, that the foregoing largely relates to the amount of money the district is able to spend for such personnel and facilities.

The defendants' counsel claims that money makes a difference. Defendants urged the Supreme Court to note probable jurisdiction because it is unlikely that those whose children now enjoy high quality education would sit happily by as the quality of that education is reduced. (Jurisdictional Statement, p. 8). In the Trial Court, the defendants argued a decision in favor of plaintiffs' could cause a reduction of funds in some districts thereby reducing the quality of education provided in those districts.

The evidence is clear, unequivocal, and uncontroverted that the quality of education a school is able to provide relates to the amount of funds that school has available for educating the school children. Dr. Cardenas points out the relationship of money and quality education. He compares Edgewood with a neighboring district comparable in size. The other district, Northeast, is wealthier, but not the wealthiest in Bexar County. It is able to provide approximately three times the library books per child. (A. 236). The average classroom size is 19, while Edgewood has an average class of 28 students. (A. 237; see also Berke Deposition, Answer 107, p. 49). He points out the great need of small classes in many courses. Edgewood cannot afford a comparable curriculum. (A. 237-238). He cites the great turnover in teachers at Edgewood (A. 237), and for the sample year, 52% of the Edgewood teachers did not have proper teaching certificates (teachers with emergency permits), while at Northeast there were only 5%.

The wealthier districts in Bexar County are able to provide three to four times more counsellors in relation to students. (A. 237). Dr. Cardenas also enumerates some of the teaching aids that are provided in other districts that Edgewood cannot afford. (A. 238).

Northeast is able to provide 1½ times more square footage of space per student for education. (A. 236). Moreover, Edgewood cannot properly maintain its buildings with its small budget and the Edgewood child may find himself in one of the school buildings with a leaky roof because the district does not have the funds to repair the roof. (A. 236). All of these disparities, he testifies, exist because of Edgewood's lack of funds. (A. 234-235).

Dr. Berke recognizes the relationship of district wealth to educational quality (Deposition, Answer 18, p. 10) and enumerates some of the disparities which Edgewood suffers. He notes that the wealthier the district, the more qualified the professional personnel (A. 210; see also Deposition, Answer 67, p. 32, Answer 32, p. 16). He also points out that the richer the district, the higher the ratio of teachers per 100 pupils. (A. 210). This is pointed out statewide in Table VI (A. 211) and Graph V (A. 212). The relationship of teacher ratios are shown in Table VI (A. 211) and Graph V (A. 212). Dr. Berke says that the pattern in Bexar County is essentially identical to the pattern statewide (A. 210) and in Table XI (A. 220) he compares the Bexar County schools in relation to professional salaries, degree qualification, student counsellor ratios and professional personnel. (A. 220; Deposition, Answer 95-97, pp. 43-45). In the categories in which the State keeps data, the disparities in quality are shown (teacher qualifications, A. 114-119 & 181-182; counsellors, A. 130-131 & 183).

Dr Cardenas (A. 234-240, Deposition, p. 4, p. 49) and Dr. Morgan (A. 241-246, Deposition, p. 59, ll. 13-22, pp. 63-68) take the position that there is a direct correlation between the quality of education a school district may provide its children and the amount of

funds it has available. (See also Berke, A. 196, 209-210).

The result is manifest and uncontested. The testimony of Dr. Cardenas is that the student in the Edgewood school district is essentially of the same age, aptitude, motivation, and ability as the students in the other districts in Metropolitan San Antonio. (A. 235). He then notes that the high dropout rate of the Edgewood children and their lower achievement levels reflect the results of the present State financing system. (A. 238 & 240). Dr. Morgan, testifying on the effect of the Texas system, points out that statewide the children in the poor districts suffer in any comparison of indicators of educational quality, citing academic achievement, functional literacy, and number of years in school. (A. 241). The longer they are in school, he testifies, the greater the disparity. (Deposition, pp. 33-34). The Report of the Governor's Committee (p. 38) acknowledges the effect of these disparities.

Defendants do not state there is evidence to support their positions that money makes no difference. Defendants do say the following: "There was conflicting testimony before [the Trial Court] on whether quality of education can be measured by dollars and cents (Graham and Stockton depositions)." (Appellants' Brief, pp. 17-18). It should be noted that Defendants are not actually contending that Mr. Graham and Dr. Stockton testified that money makes no difference. Dr. Stockton, as an economist, testified only on the economic index and how it operates. He did not state or imply that the amount of money spent does not relate to the quality of education a school district can provide. On the other hand, Mr. Graham expounded upon the amount of money the State was putting into public school education to improve the quality of education.

While stating that money does affect quality (Deposition, p. 46), he said there are also other factors that relate to quality of education. Those factors he mentioned point up the need for money, i.e.: quality of teachers and quality of administrators. In fact, Mr. Graham and Defendants' counsel aver that local taxation is to allow local school districts to raise revenues to provide better quality education. (Deposition, p. 22, ll. 1-6, p. 71, ll. 15-21).

Defendants cite educational studies that recognize equal money alone cannot cure the damages caused by discrimination and deprivation. They translate this comment on the tragedy of discrimination to mean that in the education of those who reside in poor districts, money does not make any difference. Defendants then create a cynical syllogism: (a) since money does not make any difference in educating the poor or people in poor districts, (b) it is constitutionally permissible to continue to discriminate against those who have already been injured by discrimination.

Defendants on the other hand urge that great sums of money are necessary to maintain high quality education in wealthy districts. Their standard is that money makes no difference in the education of those who have suffered from discrimination, but large sums are required to educate those who are privileged to live in wealthy districts. The defendants have failed to give this argument any evidentiary support.

PART B

8. Introduction to Legal Analysis

As plaintiffs have detailed in Part A, the method of financing public schools in Texas is both irrational and discriminatory. The amount of money which is dedi-

cated by the state to the education of a child is contingent neither upon any characteristic of the child, nor upon the interest of the family and child in securing a quality education. Rather the accident of where the child lives, the accident of his family's wealth, and, even more clearly, the accident of neighbors' wealth determines his educational opportunity. The system is capricious and irrational. More than that, it is backwards: it favors the affluent and discriminates against those whose need is the greatest. The state denies to its children even the semblance of an equal start in life. Texas does not even guarantee a child a minimum or adequate education – the only minimum is what the lowest-expenditure district chooses to spend for education. Indeed, the State of Texas does not go so far as to monitor or accumulate data on the adequacy of local educational programs.

This came about as a result of State action. The State has set school district boundaries; the State has chosen to allow local districts to rely upon and retain all property tax revenues; the State-created districts have widely varying property values per student; the State, thereby, has made some districts poorer than others; the State does not distribute its aid to equalize expenditures; the State has chosen a program which discriminates against children living in poor districts – most of whom are poor and members of minority groups. This scheme is not necessitated by administrative convenience; it undermines, rather than enhances, local control; and it deprives substantial numbers of children of an equal educational opportunity.

Yet, as the defendants remind us, the fact that an enormous political and educational wrong has been visited upon large numbers of powerless children, does not necessarily invite judicial intervention. The injury

must amount to a constitutional deprivation to justify such intervention. The Court should not entertain any doubts as to the constitutional vitality of the plaintiffs' claims. Under the Equal Protection Clause of the Fourteenth Amendment, whether the Court applies the rational basis or the compelling state interest test, the Texas scheme for financing the public schools is unconstitutional. *Reed v. Reed*, 404 U.S. 71 (1971); *Weber v. Aetna Casualty and Surety Co.*, 92 S. Ct. 1400 (1972).

Defendants characterize these legal arguments as "simplistic," and, in a sense, the plaintiffs agree. The State has chosen to allocate education services, possibly the most vital service it provides, in a way which systematically deprives children living in poor districts of an equal educational opportunity. Plaintiffs are attacking a system of financing which creates a privileged group of beneficiaries, thereby depriving plaintiffs of the opportunity to achieve socio-economic success, to participate fully in the democratic process, to exercise their First Amendment speech rights, and to develop their intellects. This is particularly invidious where the class being adversely treated consists of children who are politically powerless and who are, for the most part, members of poor and minority group families. Thus, amidst all the "labels" and "tests", one inescapable conclusion justifies the intervention of this Court: the State of Texas has systematically deprived the poor and powerless of their only opportunity to escape the bonds of their environment and to participate fully in American life. Through the state created and operated public school system, Texas has chosen to reinforce the privilege of those already blessed with economic and political well being, turning relative advantage into a self-fulfilling prophecy.

9. The Compelling State Interest Test is Applicable

a. Introduction

As this Court recently reaffirmed in *Weber v. Aetna Casualty Co.*, 92 S. Ct. 1400, (1972), a variety of formulations of the requirements of the Equal Protection Clause have been evolved, depending upon the circumstances of the case and the interests at stake. *Dunn v. Blumstein*, 405 U.S. 330, (1972). Where a fundamental interest is at issue or inferior treatment is afforded a suspect class, the State must show that a compelling or substantial interest is being served that cannot be satisfied by some less onerous alternative. Mere rationality will not suffice. Thus, race and poverty have been characterized as "suspect" classifications, and voting, interstate travel, and fair criminal process as fundamental rights. See, *e.g. Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Bullock v. Carter*, 405 U.S. 134 (1972); *Weber v. Aetna Casualty and Surety Co.*, 92 S. Ct. 1400 (1972); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

b. Education is a Fundamental Interest

Although this Court has never expressly held that education is a fundamental interest, there is strong dicta to this effect. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Weber v. Aetna Surety & Casualty Co.*, 92 S. Ct. 1400 (1972). We begin with the often quoted, yet clearly applicable, encomium to education contained in *Brown v. Board of Education*, 347 U.S. at 493:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expen-

> ditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

This passage from the *Brown* opinion sounds a theme at the heart of the American educational and political tradition. Education is a great deal more than a "nice-to-have" public service. *Palmer v. Thompson*, 403 U.S. 217 (1971) (Mr. Justice Blackmun concurring). The public schools have long been viewed as the inculcators of civic virtue, intelligence, and, equally as important, as a legitimate and peaceful instrumentality for socio-economic mobility. See generally Silberman, *Crisis in the Classroom*, Chapter 3 (1970); Dewey, *Democracy and Education*, Chapter 9 (1968); Cremin, *The Genius of American Education* (1965). Horace Mann wrote:

> Education then, beyond all other devices of human origin, is a great equalizer of the condition of men, – the balance wheel of the social machinery ... [It] gives each man the independence and the means by which he can resist the selfishness of other men. It does better than to disarm the poor of their hostility toward the rich; it prevents being poor.

Mann, *Twelfth Annual Report as Secretary of Massa-*

chusetts State Board of Education, in Commager, *Documents of American History*, 317, 318 (6th ed. 1958). This tradition of peaceful change demands that each child, irrespective of his background, through diligence and perseverance, and the opportunity afforded by the public schools, should be able to take his fair share of society's status and income rewards. As Professor Karst puts the point, "For generations education has been seen as one of the major paths for those who would be economically and socially mobile. Not only is it the gateway through which poor people enter into the middle class; it is also a gateway to the world, through which the child receives the culture." Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 722 (1972). See also Coons, Clune & Sugarman, *Private Wealth and Public Education* 364-366, 370-373, 387-393, 397-419 (1970); *Who Pays for Tomorrow's Schools: The Emerging Issues of School Finance Equalization*, 2 YALE REV. OF LAW AND SOCIAL ACTION 107 (1971).

In a highly complex society, with its "nuclear physicists, ballet dancers, computer programmers, [and] historians, formal training" is an absolute prerequisite to success. *Wisconsin v. Yoder*, 92 S. Ct. 1526, 1545 (1972) (Concurring opinion of Mr. Justice White). Thus, the importance of the educational interest, to the social and economic welfare of both the state and individual, demands its treatment as a fundamental interest. This fundamentality is manifested in many ways:

1. Education is essential to the maintenance of the free enterprise system; for it enables the individual to compete in the economic marketplace, irrespective of his socio-economic back-

ground, on an equal basis. The public schools are the great hope of the poor and minority groups; they represent their greatest opportunity to achieve economic security and social status.

2. Education is vital to the development of the individual. The educational system attempts "to nurture and develop the human potential of ... children ... to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance," *Wisconsin v. Yoder*, 92 S. Ct. 1526, 1545 (1972) (Mr. Justice White concurring).

3. Education is universally relevant, and it is compulsory. §21.032, Texas Education Code. While most children, fortunately, do not receive welfare payments from the state, while many can avoid the necessity of calling the police or fire departments, virtually all children receive the benefits of public schooling. The contact generally occurs over a twelve year period, it is intensive, and it happens during the crucial formative years before adulthood.

4. Education is a vital element in the molding of personality; it shapes the attitudes and values which will be held by an individual throughout his lifetime.

5. Education is vital to the economic and political survival of the state; an educated populace allows a nation to compete and protect itself in the world community.

See generally *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971).

While education is vitally important to the social and economic interests of the individual and the state, defendants urge that this very importance precludes the inclusion of education among those interests termed constitutionally fundamental. Defendants rely upon *Dandridge v. Williams*, 397 U.S. 471 (1970), for the proposition that

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

Dandridge does not apply to the present case. *Dandridge* involved an interest in welfare payments, a form of governmental largesse, which historically has received less judicial solicitude than education. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954) with *Jefferson v. Hackney*, 92 S. Ct. 1724 (1972). Our national tradition of public education is far stronger than the welfare tradition; the emphasis in education has traditionally been the provision of opportunity to obtain goods and services and not on direct dispensation of dollars for that purpose. Unlike welfare, education is compulsory; the state provides it to virtually all children, and it is not a stop-gap emergency to replace private activity. This distinction is amply reflected in the history of the Texas Constitution: welfare traditionally was specifically prohibited, *Jefferson v. Hackney*, 92 S. Ct. 1724, 1726 (1972), while state financed public schools were mandated in every state constitution since 1845. TEX. CONST. Art. VII, §1. See VERNON'S ANN. TEX. CONST., p. 373 (1955). Additionally, *Dandridge* did not involve a classification by wealth: all those on the welfare rolls were poor, the law under attack merely drew lines by family size among poor people. The state

did not create large families, but the state did create school districts which are poor.

More fundamentally, however, defendants ignore the fact that education is not exclusively an economic and social welfare issue. Mr. Justice Stewart carefully avoided sweeping all interests within the "social welfare" category:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families.

Dandridge, 397 U.S. at 484. Specifically, education, as distinguished from welfare, does affect the rights of free association and speech guaranteed by the Bill of Rights; it enables the individual to understand ideas and concepts, it protects his political associations, it gives him the ability to communicate with his fellow citizens. See Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 350 (1972). Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Education, most importantly the learning of language, is a precursor to cognition, perception, and communication. See generally Langer, *Philosophy in a New Key* (1951).

While, no doubt, the First Amendment protects uninformed, unpersuasive, and possibly unintelligible speech, the meaningful exercise of that right, enabling the speaker to convince and persuade, is dependent upon his ability to speak intelligently and knowledgeably. This is the essence of free speech guarantee. It is not the act of vocalizing meaningless sounds that is the

raison d'etre for judicial protection; rather it is the process of exchanging ideas for the purpose of gaining "wisdom in action." Meikeljohn, *Free Speech and Its Relation to Self-Government* 25 (1948). "It is . . . the best process for advancing knowledge and discovering truth." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 881, (1963). Or as Thomas Jefferson confidently stated in his First Inaugural Address in 1801:

> If there be any among us who would wish to dissolve this union or to change its republican form, let them stand undisturbed as monuments of the safety with which *error of opinion may be tolerated, where reason is left free to combat it.*

House Document No. 218, 87th Cong. 1st Sess., *Inaugural Addresses of the Presidents of the United States*, 14 (1961). See also *Schneider v. State*, 308 U.S. 147, 161 (1939); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis concurring); Letter from Thomas Jefferson to James Madison, December 20, 1787, in 12 *The Papers of Thomas Jefferson* 438, 442 (Boyd, ed. 1950).

The effect of the Texas financing scheme, providing the children in poor districts with an inferior educational opportunity, is to deprive them – in a systematic, if imperfect, way – of an equal ability to communicate in a meaningful fashion, and thereby to diminish their influence in the political and social processes. See generally Emerson *supra* at 882-884. Moreover, "[i]t is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Martin v. City of Struthers*, 319 U.S. 141

(1943). The State of Texas has undertaken an educational effort, involving approximately 2 billion dollars a year, for the purpose, among others, of insuring to itself an informed citizenry, able to communicate and exchange ideas for the betterment of the entire state. Whether or not Texas was obligated to promote the flow of ideas to children, it voluntarily chose to do so. Having made this choice, it must abide by the constitutional dictate of equal protection in administering the public school system. By its adoption and continued implementation of a discriminatory educational financing scheme, Texas denies to its poor and minority group children an equal right to know and to be informed. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). This is particularly tragic since these children, coming from disadvantaged backgrounds, are unlikely to acquire this knowledge on their own within the confines of their environment. They are not afforded the luxury of well-educated parents and friends, nor do they have the option to seek fulfillment of their right to know in the private school market. If an adult has a constitutional right to peruse obscene materials in the home, can it be doubted that it is far more compelling under the present facts for a child to learn about science, American history, and reading and writing? Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969).

Plaintiffs believe that often only the well-educated, articulate citizen is in a position to make himself heard by government. Whether we are speaking of the judicial process, administrative complaint procedures, or a letter to a state representative or Congressman, the educated citizen is at a marked advantage in protecting his rights and seeking changes in governmental policies. Public education, by fixing the parameters

of political discussion by virtue of the values it inculcates and by training its students in communication skills, may well determine the limits of an individual's ability to participate in the political process. This thought is aptly expressed in the Texas Constitution:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

TEX. CONST. Art. VII, §1. See also Meiklejohn, *Political Freedom* 8-92 (1965); Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 893-894 (1963). Moreover, education is distinctly related to the right to vote; for often the uneducated citizen cannot assimilate the battery of conflicting political opinions and cast his vote wisely. As this Court stated in another context,

> The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a state might conclude that only those who are literate should exercise the franchise.

Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959). See also *Serrano v. Priest*, 487 P. 2d 1241, 1258 (Cal. 1971). Compare *State of South Carolina v. Katzenbach*, 383 U.S. 301, 333-334 (1966); *Harper v. Virginia State Board of Education*, 383 U.S. 663, 665-666 (1966). By financing education on a discriminatory basis, that is by assuring children in poor districts an inferior educational opportunity, the State

of Texas has greatly disadvantaged these children in their ability to participate in the democratic process. When these children are poor or Black or Mexican-American, this state-imposed burden is heaped upon the disadvantages already suffered by those groups.

This Court has on many occasions indicated the importance of education to both the individual and society. See, *e.g.*, *Healy v. James*, 92 S. Ct. 2338 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Abington School Dist. v. Schemp*, 374 U.S. 203, 230 (1963) (Mr. Justice Brennan concurring); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Mr. Justice Frankfurter concurring); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). The message has not been lost on state courts and lower federal courts. In *Serrano v. Priest*, 487 P. 2d 124 (Cal. 1971), the Supreme Court of California held that education was a fundamental interest. The California Court found support for this proposition by analogy to the voting and criminal process cases (*Harper v. Virginia Board of Elections*, 383 U.S. 663 [1966]; *Griffin v. Illinois*, 351 U.S. 12 [1956]), and by reference to the United States Supreme Court decisions denominating the vital importance of education:

> Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "[E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which – to the state – have an enormous and much more varied

> significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few."
>
> The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights . . ." [Citing Reynolds v. Sims, 377 U.S. 533, 562 (1964)].

See also *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Sweetwater County Planning Committee v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

There are a myriad of other state and federal cases which have characterized education as a fundamental interest. See, *e.g.*, *Cook v. Edwards*, 341 F. Supp. 307 (D. N.H. 1972); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D. St. Croix 1970). Cf. *Pennsylvania Ass'n Retard. Child v. Commonwealth of Pa.*, 334 F. Supp. 1257 (D. Pa. 1971) (Consent Order); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970); *Marlega v. School Board Directors of Milwaukee*, Civil Action No. 70-C-8 (E.D. Wis. 1970) (temporary restraining order); *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969); *Wolf v. Legislature of the State of Utah*, Civil Action No. 182646 (3rd Dist. Ct. 1969); *Manjares v. Newton*, 411 P.2d 909 (Cal. 1966); *Piper v. Big Pine School Dist.*, 226 P. 926 (Cal. 1924).

The foregoing cases are significant not only because of the finding of fundamentality, but also because most of these courts have intervened even in the absence of

a suspect classification. The defendants argue on both sides of the issue as to whether or not both a fundamental interest and a suspect classification are necessary to trigger the compelling state interest test: when faced with this Court's holding in *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966) and *Griffin v. Illinois*, 351 U.S. 12 (1956), defendants explain those decisions as premised on the concern for fair criminal procedure and for voting rights and not on the proposition that wealth is a suspect classification. (Appellants' Brief, p. 30). But see *Bullock v. Carter*, 405 U.S. 134 (1972); *Gordon v. Lance*, 403 U.S. 1, 5 (1971). Only three pages earlier, however, defendants asserted that both a suspect classification and a fundamental interest were required to trigger the compelling state interest test, on the premise, *Harper* and *Griffin* necessarily held both that the interests involved were fundamental and wealth was a suspect classification. (Appellants' Brief, p. 27).

Defendants cannot explain *Harper* and *Griffin* on the basis of their operating assumptions. Nevertheless, the Court has *not* held that both a suspect classification and a fundamental interest are necessary. This Court has often applied the compelling state interest test, in the absence of a suspect classification, when a fundamental interest is at stake. See, *e.g.*, *Kramer v. Union Free School District*, 395 U.S. 621 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

In most cases where courts have declared education to be fundamental, they have held school exclusionary policies unconstitutional as an infringement upon the interest of the individual in education. See, *e.g.*, *Manjares v. Newton, supra; Piper v. Big Pine School Dist.*,

supra; Cook v. Edwards, supra; Ordway v. Hargraves, supra. To be sure, a complete denial of all educational opportunity is more compelling than a relative denial. But in view of the magnitude of the differences in the capacity of state-created school districts in Texas to raise education dollars, and in light of the vast disparities in educational expenditures between districts, plaintiffs have surely been injured in a comparable way. A complete denial of all educational opportunity is not necessary to demonstrate an unconstitutional deprivation. See, *e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Can the State of Texas open its doors to the poor, compel their attendance (§21.032, Texas Education Code), and then effectively deprive them of an equal educational opportunity because of their economic status? This Court may affirm the judgment of the court below simply on the theory that education is a fundamental interest which has been denied to children living in poor school districts. There is no compelling reason to justify this discrimination, and the Court need not reach the question of whether a suspect classification is involved in order to affirm.

c. Wealth is a Suspect Classification

The Texas education finance statutes operate to injure children living in poor districts, who, as the lower court found, are usually poor themselves. As this Court has repeatedly emphasized, classifications that unequally burden the poor with respect to the enjoyment of a fundamental interest are constitutionally suspect. See, *e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956). This reasoning

should apply to education just as it has been held applicable to criminal process, the right to vote and the right to travel freely. Because the poor, like racial and ethnic minorities, have been unable to secure basic rights through the legislative process, they have long been viewed as among the "discrete and insular minorities" for whom the Court exercises special solicitude. *United States v. Carolene Products*, 304 U.S. 144, 153 n. 4 (1938). As a result, the child's claim on education dollars turns on relative wealth, just as did the accused man's claim to a transcript, *Griffin v. Illinois*, 351 U.S. 12 (1956); or to an attorney, *Douglas v. California*, 372 U.S. 353 (1963); or a person's claim to vote, *Harper v. Virginia*, 383 U.S. 663 (1966); or to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969). A remedy which protects the poor against such discrimination is similarly called for here.

This case is readily distinguishable from *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom McInnis v. Ogilvie* 397 U.S. 74 (1970) (summary affirmance); and *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd* 397 U.S. 46 (1970) (summary affirmance). "Plaintiffs in *McInnis* sought to require that educational expenditures in Illinois be made solely on the basis of the pupils' educational needs." A. 265. Plaintiffs herein did not pray for such a declaration. An "educational needs" formula is "unworkable", and involves the Court in "endless research and evaluation for which the judiciary is ill-suited." A. 265. The Fourteenth Amendment prohibits discrimination, but mandates no specific remedy. This Court need only declare the Texas School financing system, which discriminates against the poor, is unconstitutional. *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971).

Defendants assert that *James v. Valtierra*, 402 U.S. 137 (1971) is fatal to plaintiffs' position. But that case involved no systematic discrimination based upon wealth. A federal statute authorized federal financial assistance for the construction of "low-rent housing projects." 42 U.S.C. §1401, *et seq.* No state was obligated to enact statutory provisions enabling local communities to participate in this program. 42 U.S.C. §1401, *et seq.* Responding to the opportunity created by the federal government, California devised a mechanism for making the necessary governmental decision in each local community. The federal statutes already required that no low-rent housing project could be built "unless the governing body of the locality involved has by resolution approved the application of the public housing agency." 42 U.S.C. §1415(7)(a). California expanded on this requirement by requiring a popular referendum, a mechanism employed by California in a wide variety of decision-making contexts. Referendum was a traditional and democratic method of dealing with decisions of import to a local community. 402 U.S. at 138. Nonetheless, plaintiffs in *Valtierra* contended that the popular referendum was inherently discriminatory against the poor. They contended that many other public matters were subject only to a "permissive" referendum, that is a referendum upon citizen initiative.

The majority of this Court rejected plaintiffs' contention. The classification in question had plainly been created initially by Congress itself – and for an entirely beneficent, non-discriminatory purpose. The State of California had merely responded to the specific opportunity that the federal statute had created when it used this same classification. There was no occasion for California to consider any other types of

governmental decision and whether they should also be subject to referendum; the state was not required to anticipate hypothetical problems. It could reasonably confront each category of decision-making in its turn. So far as the majority of the Court was concerned, California did not in any way discriminate against the poor: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." 402 U.S. at 141. Moreover, the Court found that the poor had not been singled out for special treatment in relation to low-cost housing:

> [A]n examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations... California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum... Some California cities have wisely provided that their public parks may not be alienated without mandatory referendums...

Thus, *James v. Valtierra* held that California had not discriminated on the basis of wealth. Cf. *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Contrary to the defendants' contention, that case does not stand for the proposition that a state may discriminate against the poor in the absence of a compelling or substantial justification for the discrimination. Not only was there no discrimination on the basis of wealth in *Valtierra*, but the opinion also suggests that housing is not a fundamental interest. This is consistent with *Dandridge v. Williams*, 397 U.S. 471 (1970). Housing is a purely eco-

nomic interest, and, most often, it is a private and not a governmental concern. Education, by contrast, is a fundamental interest with both economic and First Amendment significance. Education in Texas is compulsory; the State is required to set-up and support an educational system (Art. VII, §1, Texas Constitution); state districts are required to support an educational system; and the satisfaction of educational needs generally occurs through governmental activity.

This interpretation of *Valtierra* is amply supported by this Court's later decision in *Bullock v. Carter*, 405 U.S. 134 (1972). In that case, plaintiffs alleged the unconstitutionality of Texas statutes requiring candidates for public office to pay filing fees, often in excess of $1,000. The Court unanimously held the required payment of these fees unconstitutional. It did so on grounds which expressly recognized the vitality of the doctrine that wealth is a suspect classification under the Equal Protection Clause:

> This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.
>
> Because the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legiti-

> mate state objectives in order to pass constitutional muster.

405 U.S. at 144, 145.

Plaintiffs submit that *Carter* is decisive. Both that case and this involve discrimination in the satisfaction of a fundamental interest. Both cases are addressed to a statutory system which discriminates on the basis of wealth. In both cases, there may be some poor persons who were not disadvantaged – those who, by chance supported affluent candidates or who lived in affluent school districts; but the "reality" is that the poor bore the brunt of the discrimination.

Defendants also argue that it has not been shown that poor people live in poor school districts, and, therefore, cases holding that individual poverty is a suspect classification are not applicable. But see *Robinson v. Cahill*, 278 A.2d 187 (N.J. 1972); *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971); *Van Dusartz v. Hatfield* 334 F. Supp. 870 (D. Minn. 1971). Such an argument, as we discussed above, ignores the findings of the lower court and attempts to retry this case *de novo* before the United States Supreme Court. Were we to assume that the poor do not live in poor districts, that is that property values do not accurately reflect personal income (but see deposition of defendants' witness John Stockton, p. 21), defendants' contention would still be without merit. *Van Dusartz v. Hatfield*, 334 F. Supp. 870, states,

> ... [t]he objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned. The heaviest burden of this

> system surely fall *de facto* upon those poor families residing in poor districts who cannot escape to private schools, but this effect only magnifies the odiousness of the explicit discrimination by the law itself against all children living in relatively poor districts.

334 F. Supp. at 875-876.

10. RATIONAL BASIS TEST.

The defendants have failed "to establish a reasonable basis" for a classification which denies an equal educational opportunity to children living in poor districts. (A. at 266). Under the rational basis test the Court is concerned with the precise nature of the governmental interest asserted and of the individual interest of those who claim to have been disadvantaged. *Bullock v. Carter*, 405 U.S. 134 (1972). The decision in *Weber v. Aetna Casualty and Suerety Co.*, 92 S. Ct. 1400 (1972), stated that:

> the tests to determine the validity of state statutes under the Equal Protection Clause had been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: 'What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?'

92 S. Ct. 1400, 1404-1405. The process then involves a weighing of the conflicting interests over a continuum, with the Court deciding which interest should be given the greater credence under the facts and circumstances at hand. Thus, even where the compelling state interest test is held inapplicable, it does not follow that any state interest, however attenuated and

insignificantly related to the object of the legislation, automatically passes constitutional muster. The unanimous decision in *Reed v Reed*, 404 U.S. 71 (1971) made this point:

> A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

404 U.S. at 76. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972).

In *Reed v. Reed*, 404 U.S. 71 (1971), the State of Idaho had enacted legislation providing that "males must be preferred to females" in the designation of persons to administer intestate estates. 404 U.S. at 76. The state defended the statute by arguing that it eliminated the need in many cases for the probate courts to choose among conflicting claims to letters of appointment. The workload of the probate courts would thereby be reduced. A unanimous Court rejected this contention without resort to the compelling state interest test, while recognizing that the proffered justification was "not without some legitimacy." 404 U.S. at 76. While the classification bore some relationship to the object of the statute, it did not have "a fair and substantial relationship" to that object. See *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Implicit in the Court's holding was that there were other means by which disputes over administration of the estate of one who dies intestate could be eliminated without relying upon an arbitrary classification by sex.

Weber v. Aetna Casualty & Surety Co., 92 S. Ct. 1400 (1972), closely resembles *Reed* in its application

of the rational basis standard. In *Weber*, the Court held a Louisiana law, denying "dependent unacknowledged, illigitimate children" recovery under the Louisiana Workmen's Compensation laws on an equal footing with dependent legitimate children, violated the Equal Protection Clause of the Fourteenth Amendment. The Court did not assert that the law was utterly devoid of rationality. Instead, it looked to both sides of the equation, and held that the State of Louisiana could find other means to encourage legitimate family relationships, means which were less detrimental to the illegitimate children who had no responsibility for the illicit liaison.

11. The Texas Financing System Scheme Serves No Compelling or Rational State Interest

The Texas school financing plan is unconstitutional under both the rational basis test and the compelling state interest test under the Equal Protection Clause of the Fourteenth Amendment. The court below held:

> Not only are defendants unable to demonstrate compelling state interest for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.

Appendix at 266. Platitudes about the longevity of the present scheme will not suffice. Nor will appeals to local control, a goal which plaintiffs share. Texas' current method of funding the public schools does not minimize adminstrative difficulties; it does not maintain effective local control; it does not encourage diversity; it does not guarantee equality. It serves no purpose except to make wealth the basis for determining the allocation of educational dollars.

Defendants contend that the purpose of the Texas financing scheme is to guarantee a minimum education

to every child in Texas, while permitting some districts to offer a superior educational opportunity when they choose to do so. They assert that the ability to supplement the minimum program is an important aspect of local control of education, a form of educational governance which has received wide public and judicial support.

As plaintiffs have demonstrated, the State of Texas does not provide a minimum educational opportunity, unless one defines that minimum as simply the lowest level of expenditure in the State. Moreover, implicit in the defendants' argument, is a recognition that the State must offer at least some minimal education to the residents of poorer districts when it offers a superior education to the State's other citizens. Any lesser proposition – involving a power to cut off education altogether on a discriminatory basis – would indeed be unthinkable. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (dicta). Yet, what is this minimum? How is it to be defined? Where does the notion of minimum find constitutional support? How is it compatible with the Fourteenth Amendment's prohibition of discrimination by the state? Defendants offer no hint of an answer; they would apparently lead the Court into an unmanageable semantic inquiry, based on an unexamined assumption that only some of the educational offering is essential.

Beyond these difficulties, defendants completely miss the point of the present litigation when they assert that each district has the opportunity to enrich its educational offering. The point of this lawsuit is the poor districts *do not have the choice.* Educators and economists have long understood that only some districts

really control their educational offering, that only some communities are fiscally capable of supplementation. See National Educational Finance Report, *Future Directions for School Financing* 3 (1971) (Funded by United States Department of Health, Education and Welfare, Office of Education); See Special Committee on School Finance of the National Legislative Conference, *A Legislator's Guide to School Finance* (1972); Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355, 1375-1376 (1971); J. Thomas, R. Jewell, and A. Wise, *Full State Funding of Schools* 1-2 (Paper prepared for the Education Commission of the States, March, 1970); Advisory Commission on Intergovernmental Relations, *State Aid to Local Government* 4-6 (1969); A Commission Staff Report Submitted to the President's Commission on School Finance, *Review of Existing State School Finance Programs* (1971); Weiss, *Existing Disparities in Public School Finance and Proposals for Reform* (1970) (Research Report No. 46 to the Federal Reserve Bank of Boston); Coons, Clune, and Sugarman, *Private Wealth and Public Education* (1971); Guthrie, Kleindorfer, Levin, and Stout, *Schools and Inequality* (1971); President's Commission on School Finance, *Schools, People & Money* (1972); Berke, Campbell, and Goettle, *Revising School Finance in New York State* (1971) (Final Report to the New York Commission on the Quality, Cost and Financing of Elementary and Secondary Education).

The evidence in this case fully documents the vast disparities among school districts in fiscal capacity to support education. Poor Texas districts often have less than one-tenth the taxable wealth of rich districts. The Andrews Independent School District, for example, has

almost $400,000 per pupil in assessed market value per student, while the Mission Independent School District has a tax base of less than $10,000 per pupil. (A. 77, 96). This means that poor districts must tax themselves at extraordinary rates in order to raise a fraction of the educational dollars expended in affluent districts. For poor districts to raise the same amount of educational dollars as rich districts, exorbitant tax rates would be necessary. For example for the Edgewood School District to offer to its students the same level of education afforded to the students of the Alamo Heights School District, it would be required to set its tax rate at $5.76 per $100 assessed valuation, or more than eight times the rate of neighboring Alamo Heights. (A. 218. See also A. 228, A. 229).

All of the virtues of local control – choice with respect to educational expenditures, the opportunity to provide diverse school experiences–are luxuries available only to rich districts, to districts with the fiscal capacity of Alamo Heights. Poor districts – like Edgewood – do not choose to spend less for education; they do not value education less; they do not prefer other municipal services. Poor districts spend less on education because they are financially incapable of doing otherwise. Those districts which have stood ready to make the greatest sacrifices for the education of their children – by taxing themselves at exorbitant rates – are the very ones that have been penalized under existing Texas statutes. Kirp and Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW AND SOCIAL ACTION 142, 144 (1971).

The Texas school financing plan provides local control for only the privileged few. Plaintiffs do not object to pluralism and diversity in educational offerings; rather they attack the debasement of those con-

cepts by a scheme that systematically discriminates against children in poor districts. In a sense, schools without well-trained teachers, without counsellors, and without proper physical maintenance exemplify a form of diversity, but where, as here, those suffering these disadvantages are poor and minority children, who in no sense chose to suffer it, this Court has adamantly refused to cloak the classification with such words of dignity and legitimacy. *McLaurin v. Oklahoma*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938). See also *Van Dusartz v. Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971).

While defendants implicitly argue that local control of education should be available only to the affluent, there is little doubt that the State of Texas does have a strong interest in decentralizing educational decision-making. However, this interest can be satisfied without penalizing the poor. *Bullock v. Carter*, 405 U.S. 134 (1972), stated that under the rational basis test, a consideration of "other means to protect [a state's] valid interests" is appropriate in determining the constitutionality of a statutory classification. If this Court holds that a state may not discriminate according to wealth in the allocation of educational services, this does not imply that there will be a leveling of educational opportunity, that innovative, "lighthouse" districts must yield to a pervasive mediocrity. For example, "district power equalizing" systems have been proposed which would reward equal district tax effort with equal dollars. Coons, Clune and Sugarman, *Private Wealth and Public Education*, 200-283 (1971). At each rate of taxation a district would be guaranteed a particular level of school revenues. In poor districts, the state could accomplish this by simply grant-

ing subsidies to make up the difference between what the district actually raised and the amount guaranteed by the state. Under this system, poor districts as well as rich districts could undertake innovative and expensive education programs, so long as they were willing to tax themselves in a fashion commensurate with their desire to spend. Diversity would thereby be fostered, and discrimination would not be cloaked in the guise of pluralism.

12. Remedies

The prohibition that a state may not discriminate according to wealth does not demand any particular legislative response; it leaves state legislatures free to choose among a host of alternatives for raising and distributing education dollars. A legislature could choose to centralize or decentralize either revenue raising or school governance; it could opt for diversity or uniformity of educational experience, for compensatory education programs designed to aid students with particular characteristics (for example, handicapped or retarded children) or for absolute equality in dollar expenditure. Characteristics of the school district, other than the wealth of its residents, might be taken into account. Such factors as the number of pupils or schools might be appropriate criteria. Extra dollars could be distributed to communities where the cost of providing educational services (most importantly, the cost of attracting qualified teachers) is appreciably higher. Older communities could be compensated for what economists term municipal overburden, the additional costs of welfare and police and fire protection. See Kirp and Yudof, *Serrano in the Political Arena*, 2 YALE REV. OF LAW AND SOCIAL ACTION 142, 145 (1971).

Thus, the remedies which would flow from an affirmance of the lower court are compatible with any legitimate state interest in educational governance. Under all the foregoing plans, the legislature could allow local school districts to make educational policy choices and to fund and administer educational programs. *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

13. THE INFANCY OF THE VICTIMS SUPPORTS THE CONCLUSION THAT THE TEXAS FINANCING SCHEME IS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

While defendants emphasize the democratic goals of a system in which each community decides whether to enrich its educational offering beyond the state minimum, plaintiffs have demonstrated that enrichment decisions are more a function of community wealth than of community choice. There is, moreover, another fundamental weakness in defendants' argument. Due to the lack of maturity of children and to the laws of the State of Texas (Chapter 827, §42a(2)9, TEX. REV. CIVIL STATUTES (Appendix 1972), elementary and secondary students are virtually excluded from participation in the political process – most importantly, they do not have the right to vote. See generally *Oregon v. Mitchell*, 400 U.S. 112 (1970); E. Friedenberg, *Coming of Age in America* (1965). If ever there was a powerless group without direct political representation, children constitute such a group. *United States v. Carolene Products*, 304 U.S. 144, 155 n. 4 (1938). As such, they are entitled to the special protection of this Court. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971). Judge Doyle sitting in the Western District of Wisconsin accurately portrayed their political plight:

> [S]tudents . . . do not vote in school board elections; political redress of their grievances is not open to them; theirs is a situation in which judicial vindication of constitutional protections has been considered particularly appropriate . . . Cautious counsel to avoid judicial involvement in serious constitutional issues merely because they concern younger people . . . is neither prudent, expedient or just.

Breen v. Kahl, 296 F. Supp. 702, 708 (W.D. Wis. 1969), *affirmed*, 419 F.2d 1034 (7 Cir.).

It may be argued that children are adequately represented by their parents, but many parents do not bother to vote, and when they do, they are concerned with a whole multitude of issues – some of which may militate toward decisions which are in opposition to the interests of the children. Moreover, even in a situation where there is an identity between the interests of parents and children, as in the present case, the poverty of the school district nullifies the effectiveness of the parents in influencing political decisions. However sympathetic district educational and political leaders may be, however insistent and persuasive the parents, poor districts are systematically incapable of enriching their educational programs.

This Court has often shown concern for the interests of children. See, *e.g.*, *Wisconsin v. Yoder*, 92 S. Ct. 1526 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). While admittedly this case involves no classification between children and adults but merely between different economic classes of children, the Court should be equally concerned. Children make no decisions about the world into which they are born. They do not choose to be attached to a poor family, they do not choose to

live in a poor school district. Children have no influence on the complex process whereby the state offers them an education. A child born and raised in a poor school district is penalized, not for any errors or decisions of his own making, but for his misfortune in being born into a poor family. He is penalized by the State for the arbitrariness and irrationality of an adult society which refuses to place him on an equal footing with his more affluent peers. In short, he is denied a reasonable opportunity to succeed in life because of his economic status, a characteristic over which he has no control. The parallel between this case and *Weber v. Aetna Casualty & Surety Company*, 92 S. Ct. 1400 (1972), where illegitimate children were denied workman's compensation benefits upon the death of their natural father, is striking. In both cases, children were seriously disadvantaged by the state on account of their status and not their actions. Mr. Justice Powell eliquently articulated the arbitrariness of such a classification:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens sould bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.

92 S. Ct. at 1406-1407. As in the case of illegitimacy, no child is responsible for his poverty, and penalizing the poor child for the economic status of his parents is unjust and violative of the Equal Protection Clause.

Whether or not a child's status is relevant to welfare, it is certainly relevant to education, the one service provided by the state that is designed to lift the child from his poverty and to permit him – through his own efforts – to achieve socio-economic success.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is the appropriate vehicle for striking down the invidious school financing practices of the State of Texas. The Equal Protection Clause forbids class legislation; it dictates that the regulators subject themselves to the same rules that they wish to apply to others. In this fashion, it affords the greatest constitutional protection against arbitrariness and irrationality in governmental decision-making. Mr. Justice Jackson eloquently stated this constitutional principle in his concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106 (1949):

> Invocation of the equal protection clause does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action

> so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation . . .

336 U.S. at 111, 112-113. In Texas, the poor receive one type of education – an inferior education by every measurement, while the affluent are afforded a quite different and superior educational opportunity. This Court should not allow Texas to impose upon a minority what is obviously unacceptable to the majority.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

Exhibits

Plaintiffs' Exhibit I: Funds Provided Per Pupil Under State System of Financing (Local and State) 1967-68. Calculated from figures furnished by Texas Education Agency (Named Districts) Same as Chart 3 Webb testimony (A. 228).

Plaintiffs' Exhibit II: Funds Provided Per Pupil from Local Ad Valorem Taxes 1967-68. Calculated from figures furnished by Texas Education Agency (Named Districts). Same as Chart 5 Webb testimony (A. 230).

Plaintiffs' Exhibit III: Percent of Anglo-American, Mexican-American, and Negro Students in Each District (1968-69) Named in Suit (A. 76).

Plaintiffs' Exhibit IV: Market Value of Property per Student for Named Districts – Calculated by dividing 1967-1968 market values as provided in Governor's Report by 1967-1968 Enrollment as answered by Texas Education Agency in Interrogatory II(b), Set I. Same as Chart 4 Webb testimony (A. 229).

Plaintiffs' Exhibit V: Chart No. 1 – Basis of Taxation Bexar County School Districts, 1970.
Same as Chart 1, Webb testimony (A. 226).

Plaintiffs' Exhibit VI: Median Per Capita Income and Median Income Per Household in Each Named School District.
Same as Chart 2, Webb testimony (A. 227).

Plaintiffs' Exhibit VII: Real Estate Market Values and Education Expenditures (Per Pupil) in Texas School Districts, 1967-68 (A. 77).

Plaintiffs' Exhibit VIII: The Relationship Between District Wealth, Income, Race, and School Revenues– Texas School Districts Categorized by Equalized Property Values, Median Family Income, and State-Local Revenues (A. 198).

Chart I – Expenditures Per Pupil in ADA in Texas (A. 203).

Table II – The Relationship of Districts Wealth to Tax Effort and Tax Yield (A. 205).

Table III – The Relationship Between District Wealth and Highest Tax Effort (A. 206).

Table IV – The Relationship of District Wealth and Highest Tax Effort (A. 207).

Table V—The Relationship Between District Wealth and School Revenues of Texas School Districts (A. 208).

Table VI – The Relationship of District Wealth to Educational Quality (A. 211).

Table VII – Relationship Between District Wealth Income, Race and State-Local Revenues (A. 216).

Table VIII – The Relationship of District Wealth to Tax Effort and Tax Yield (A. 217).

Table IX – Relationship Between District Wealth and Highest Tax Effort (A. 218).

Table X—The Relationship Between District Wealth and School Revenues (A. 219).

Table XI – The Relationship Between District Wealth and Educational Quality Texas School Districts Categorized by Equalized Property Valuation and Selected Indicators of Educational Quality (A. 220).

Plaintiffs' Exhibit IX: Graph I – The Relationship Between District Wealth and State-Local Revenues (A. 199). Plaintiffs' Exhibits VIII and IX are included in Berke testimony with same table, chart and graph designations.

Graph II – The Relationship Between Median Family Income and State-Local Revenues (A. 201).

Graph III – The Relationship Between Per Cent Nonwhite and State-Local Revenue (A. 204).

Graph V – Relationship Between Professional Salaries Per Pupil and Equalized Valuation Per Pupil (A. 212).

Graph VI – The Relationship of Professional Personnel to Equalized Market Value Per Pupil (A. 213).

Plaintiffs' Exhibit X: Expenditures Per Pupil in ADA in Texas (A. 98).

Plaintiffs' Exhibit XI: Answers to Plaintiffs' Interrogatories – Set 1. Named Districts (A. 100).

Plaintiffs' Exhibit XII: Answers to Plaintiffs' Interrogatories – Set 2. Named Districts (A. 173).

Plaintiffs' Exhibit XIII: Interrogatories I – Set 6, Book 1.

Plaintiffs' Exhibit XIV: Interrogatories I – Set 6, Book 2.

Plaintiffs' Exhibit XV: Interrogatories I.

Plaintiffs' Exhibit XVI: Interrogatories I, Set I

Plaintiffs' Exhibit XVII: Interrogatories I

Plaintiffs' Exhibit XVIIIa: The Challenge and the Chance – Report of the Governor's Commission on Public School Education (1968).

Plaintiffs' Exhibit XVIIIb: The Challenge and the Chance (Supplement) Report to Governor's Committee on Public School Education (Dec. 1968).

Plaintiffs' Exhibit XVIIIc: Property Taxes in Texas School Districts – A Study for the Governor's Committee on Public School Education (Charles R. Bartlett, MAI).

Plaintiffs' Exhibit XVIIId: The Challenge and the Chance Research Report Vol. I Public Education in Texas – Perspective Context, and Goals (1969).

Plaintiffs' Exhibit XVIIIe: The Challenge and the Chance Research Report Vol. II, Public Education in Texas – Program Evaluation (1969).

Plaintiffs' Exhibit XVIIIf: The Challenge and the Chance Research Report Vol. II, Public Education in Texas (1969) Report to Governor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIg: The Challenge and th
Chance Research Report Vol. II, Public Education i
Texas – Program Evaluation (1969) Report to Gov
ernor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIh: The Challenge and th
Chance Research Report Vol. III, Public Educatio
in Texas – Staffing the System (1969) Report to Gov
ernor's Committee on Public School Education.

Plaintiffs' Exhibit XVIIIi: The Challenge and th
Chance Research Report Vol. IV, Public Education i
Texas – The Organizational Structure (1969).

Plaintiffs' Exhibit XIX: Interrogatory I, Set 6, Boo
3.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*, *Appellants,*

v.

DEMETRIO P. RODRIGUEZ, *et al.*, *Appellees.*

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF FOR WENDELL ANDERSON, Governor of the State of Minnesota KENNETH M. CURTIS, Governor of the State of Maine RICHARD F. KNEIP, Governor of the State of South Dakota PATRICK J. LUCEY, Governor of the State of Wisconsin WILLIAM G. MILLIKEN, Governor of the State of Michigan AS AMICI CURIAE

MOTION

Amici hereby respectfully move for leave to file a brief urging affirmance of the lower court decision in the above-entitled case. Counsel for Appellees have consented to the filing of the attached brief. Counsel for Appellants have not so consented.

Amici are the Governors of the above-listed States. As Governors and chief executive officers of their respective States, Amici are responsible for upholding and carrying out the commands of the Constitutions

and laws of their States, including the provisions thereof requiring the establishment of public schools and commanding the children of their States to attend school for a substantial number of years. Each Amicus is responsible, as the elected representative of the entire citizenry of his State, for financial decisions affecting all State operations, including those pertaining to the support and finance of the public schools.

Amici are deeply concerned about the continuing crisis in public education and the difficulties facing public educational systems in their States and around the nation. Amici recognize that grave inequities now exist in the educational resources available to public school students, and that these inequities exist because of vast disparities in the local property tax bases upon which the various States have required local school districts to rely for the support of public education. Amici, whose States have educational systems which suffer in one degree or another from the same infirmities as the financing system here at issue, believe that the inequities in educational resources resulting from such systems are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that these inequalities must be eliminated.

In pursuance of their duties as chief executive officers of their States, Amici have thoroughly examined and are familiar with school financing problems.* As a result of these studies, Amici have concluded that it is

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* Specific statements of the involvement of the Amici Anderson, Curtis, Kneip, Lucey and Milliken with school financing programs appear at pages III-VIII of Amici's Motion for Leave to File Brief submitted to this Court in connection with the Jurisdictional Statement.

necessary, in order to maintain a viable system of public education available to all without discrimination based upon wealth or other factors irrelevant to the educational process, to devise a system which provides:

—quality education for every child, regardless of his place of residence;

—a rational method of financing the educational system which assures the availability of the needed resources;

—equity of tax burden among the citizens of a state; and

—meaningful local control over educational matters where appropriate.

Amici believe that financing systems which meet the above-listed requirements, and which eleminate the wealth discrimination and resulting constitutional problems stemming from the current local property tax-based systems, can be instituted without great difficulty, social or administrative, by the adoption of school finance systems not dependent upon the wealth of the local school districts.

Amici further believe that the standard adopted by the court below is uniquely suited to bring about the achievement of a constitutional non-discriminatory method of public school finance without in any way infringing on the proper sovereign prerogatives of the various States, including those of which they are Governors. The decision of the court below sets forth a single easily comprehensible constitutional command and quite properly leaves it to the States to choose, as they can and must, from a multitude of possible financing systems.

For these reasons, Amici request that this Court grant leave to file the attached brief urging affirmance of the decision of the lower court.

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August 21, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*, *Appellants,*

v.

DEMETRIO P. RODRIGUEZ, *et al.*, *Appellees.*

On Appeal from the United States District Court for the Western District of Texas

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BRIEF FOR

WENDELL ANDERSON, Governor of the State of Minnesota
KENNETH M. CURTIS, Governor of the State of Maine
RICHARD F. KNEIP, Governor of the State of South Dakota
PATRICK J. LUCEY, Governor of the State of Wisconsin
WILLIAM G. MILLIKEN, Governor of the State of Michigan

AS AMICI CURIAE

INTRODUCTION

Article VII, § 1 of the Constitution of the State of Texas provides that:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Over the years since Texas, in its first statehood Constitution of 1845, adopted the predecessor of Article

VII, § 1, the method used to finance the State public school system has varied. Thus, while originally the schools were to be supported by the State directly, for some time Texas has supported its public schools in large part with funds raised from school district property taxes.[1]

The details of the Texas financing system as it has evolved are complicated, but the general workings and effect of the system are both clear and undisputed:[2] the reliance upon local property taxes for school funds has made the local property tax base the primary determinant of the amount of funds available for the schools in any district, and this amount varies tremendously from district to district within the Texas school system.

Of the 79 Texas school districts with over 5,000 students, the richest has a tax base per pupil more than 23 times that of the poorest. By taxing at equal rates, the richest of these districts would have 23 times more dollars per pupil to spend on its schools than would the poorest. The Plaintiffs' Edgewood school district in metropolitan San Antonio could raise only $37 per pupil in 1969-70 while the Alamo Heights school district, also in metropolitan San Antonio, was able with a lower tax rate to raise $412 per pupil. Thus, the dif-

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[1] A brief history of Texas' school financing system appears in 5 Governor's Committee on Public School Education, The Challenge and the Chance: Public Education in Texas—Financing the System 11-17 (1969) [hereinafter cited as Public Education in Texas].

[2] The parties stipulated below that the "facts are generally not in dispute." Appendix, p. 45 ¶ 6 [hereinafter cited as App.]. A full and comprehensible description of the Texas school finance system is J. Berke, A. Carnevale, D. Morgan & R. White, *The Texas School Finance Case: A Wrong in Search of a Remedy*, J. Law & Educ. (to appear in Fall, 1972).

ference in funds raised locally was due solely to the disparities in wealth between the two districts.[3]

In addition to the funds the local districts raise themselves, each district receives a direct payment from the State. These payments are made in recognition of the fact that the property tax-based system works great discriminations,[4] and, in theory, are supposed to lessen the extent of the discrimination among districts. In fact, the grants to local districts are calculated in a fashion that not only does not substantially alleviate the differences between the rich and the poor districts, but in many cases actually provides more dollars to wealthy districts than to poor ones.[5] Thus, Alamo Heights received $250 per pupil in direct State grants in 1969-70 while Edgewood, despite the fact that it could itself raise less than one eleventh as much per student, received only $242.

The court below agreed with Plaintiffs' contentions that the Texas school financing system outlined above substantially disadvantages children residing in property-poor districts. Indeed, the court found that Texas has chosen "to subsidize the rich at the expense of the poor" (App. 262) and enjoined Texas from continuing to make "the quality of public education a function of

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[3] *See* Pl. Ex. 12 based upon computer runs supplied by the State of Texas Education Agency. *See also* App. 217, 219.

[4] It was the recognition of these discriminations by the Texas Legislature's Gilmer-Aiken Committee in 1948 that led to the adoption of the present system. *See* Gilmer-Aiken Committee, To Have What We Must (1948).

[5] App. 208. *See also* United States Commission on Civil Rights, The Texas School System 31 (1972) (page cite is to the Commission-approved typewritten copy; publication in printed form is expected shortly).

wealth other than the wealth of the State as a whole." (App. 270).

The State's appeal thus raises in this Court the constitutionality of the discriminatory system presently used by Texas to finance public education, a system in which discrimination arises solely because the State has chosen to provide revenue for its schools based upon a factor—the wealth of the district in which the schools are located—having no relation whatsoever to any educational goal.

As State Governors with responsibility for the interests of all the children of their States, Amici are committed to reforming the present discriminatory systems of school financing, systems which plainly cannot and do not work,[6] and replacing them with systems which operate without discrimination on the basis of local district wealth. That result, Amici believe, is dictated by equity and common sense, as well as constitutionally required.

Amici have concluded that there is no practical or administrative reason why revised systems of financial support of public school systems, consistent with the decision of the court below, cannot be instituted, and that public school systems of the type required to provide equal educational opportunities for *all* children—not merely those from rich school districts—can only result from the standard found constitutionally required by the court below. Amici therefore urge that the decision be affirmed.

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[6] *See, e.g.*, President's Commission on School Finance, Schools, People & Money: The Need for Educational Reform 11-15 (1972) [hereinafter cited as President's Commission]; National Legislative Conference, A Legislator's Guide to School Finance 13-22 (1972).

ARGUMENT

The Decision of the Court Below That the Provisions of the Constitution and Laws of Texas Governing the Financing of Public Education Violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution Should Be Affirmed

Amici submit that because the present case involves public education and the manner in which such education is furnished to the nation's children, it has an importance far beyond that suggested by Appellants.

Appellants and their supporters seek to trivialize the present case by characterizing the issue as whether a "Proposition I" developed by "imaginative scholars" should proceed to "enshrinement in the Constitution of the United States." (App. Br. 8). Amici, State Governors deeply concerned about inequities in educational finance, submit that the real issue in this case is whether the Fourteenth Amendment prohibits States from providing more tax dollars for public education to rich districts than to poor districts. The fact that, in addition, the poor districts are taxed more heavily than rich districts to provide such funds merely serves to exacerbate the discrimination.

I. THE ROLE OF EDUCATION IN AMERICAN SOCIETY IS UNIQUE

A. EDUCATION IS A STATE FUNCTION

1. The States Are Required by Their Constitutions To Provide Free Public Education

The Constitutions of 48 of the 50 States require the State legislature to establish a system of public

schools.[7] Article VII, § 1 of the Texas Constitution is typical in this regard:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

The history of the Texas constitutional provisions is illustrative of the significance of education as a State function. The 1827 Constitution of the Mexican State of Coahuila and Texas provided that the State was to establish schools in all towns. No schools were in fact established, and the neglect of public education by the State "was one of the chief grievances charged against the Mexican government" when Texas declared its independence.[8] The Constitution of the Republic of Texas declared that:

> It shall be the duty of Congress, as soon as circumstances will permit, to provide by law a general system of education. General Provisions, Section 5 of the Constitution of 1836.

This provision formed the basis for Texas' current constitutional requirement that the State establish a system of "free public schools."

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[7] *See* the table reproduced as an Appendix to this brief. Until the decision in Brown v. Board of Education, 347 U.S. 483 (1954), all 50 States had constitutional provisions requiring public schools. In attempts to avoid the mandate of *Brown*, Mississippi made its constitutional provision discretionary with the State legislature and South Carolina repealed its constitutional provision altogether.

[8] *See* Interpretive Comment, 2 Vernon's Constitution of the State of Texas Annotated 373 (1955).

2. Local School Districts Are Simply Agencies of the State

In interpreting this constitutional provision, the courts of Texas have recognized that education is a State function. Thus, it was observed in *El Dorado Independent School District* v. *Tisdale,* 3 S.W.2d 420, 422 (Tex. Comm. Civ. App. 1928), that:

> [I]n constitutional terms, it is commanded that the Legislature shall 'establish and make suitable provision for the support and maintenance of an efficient system of public free schools.' The object, manifestly, is a state object: its achievement, as plainly, is to be in consequence a use of state power. . . .

Furthermore, the Texas courts, like the courts in other states,[9] are emphatic in asserting that local school districts are nothing more than administrative units set up for the convenience of the State in administering its system. In *Treadway* v. *Whitney Independent School District,* 205 S.W.2d 97, 99 (Tex. Civ. App. 1947) the court declared:

> [W]hen carrying out the functions for which it was thus created, [a school district] could act only as an agent of the state. . . . As a result of the acts of the Legislature our school system is not of mere local concern but is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas.

These court decisions recognize what is the fact not only in Texas, but in every one of the United States: education is a State function.

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[9] *See* the decisions discussed in A. Wise, Rich Schools, Poor Schools 94-98 (1968).

3. State Statutes Regulate Every Aspect of Public Education

State control in Texas, as elsewhere, extends to in-depth statutory regulation of the educational system. Thus not only does the State of Texas create, consolidate and abolish school districts (Ch. 19, Texas Education Code, Acts of 1969, Ch. 889),[10] but it regulates their activities down to the minutest detail. The Texas Education Code contains some 250 pages of statutes controlling, *inter alia,* mandatory subject matter, acceptable textbooks, teacher qualifications and tenure, personnel salary bases, special programs, length of school day, and a variety of other details. Acts of 1969, Ch. 889, *passim.*[11] Most importantly, the school districts have taxing power only because and to the extent that the State has delegated its power to tax for schools. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1 —2802i-32, as amended by Acts of 1969, Ch. 889.

While certain of the details vary from State to State, the State's control of the educational system and of the school districts as a part of that system was aptly put by the Supreme Court of Illinois in *People* v. *Deatherage*, 401 Ill. 25, 31-32, 81 N.E.2d 581, 586 (1948):

> A community school district, like any other school district established under enabling legislation, is

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[10] *See also* United States v. Texas, 321 F.Supp. 1043 (E.D. Tex. 1970).

[11] Among the Texas Education Code's provisions regulating the details of school operations are §§ 4.15-.16 (criminal penalties for failure to teach required subjects); §§ 21.101-.112 (required subjects); §§ 12.11-.27, 12.62 (schools required to use State-approved textbooks and approval procedures established); Chs. 13 and 21, Subch. D (procedures for teacher certification and dismissal established); § 16.31 (teachers' base pay fixed); §§ 11.03-.11 (special programs); § 21.002 (length of school day); § 2.06 (State oath required of teachers); § 11.52 (uniform system of forms and reports for schools).

> entirely subject to the will of the legislature thereafter. With or without the consent of the inhabitants of a school district, over their protests, even without notice or hearing, the State may take the facilities in the district, without giving compensation therefor, and vest them in other district agencies. . . . The area of the district may be contracted or expanded, it may be divided, united in whole or in part with another district, and the district may be abolished. All this at the will of the legislature. The "property of the school district" is a phrase which is misleading. The district owns no property, all school facilities, such as grounds, buildings, equipment, etc., being in fact and law the property of the State and subject to the Legislative will . . . .

In sum, school districts are simply administrative units created by the States for their convenience in the operation of the State school system, in accordance with the mandate of each State's constitution.[12]

B. THE STATES HAVE HISTORICALLY TREATED EDUCATION AS BEING DIFFERENT FROM OTHER GOVERNMENTAL SERVICES

For both historical reasons, and reasons relating to the functioning of the American political system, education occupies a place in the hierarchy of rights and privileges of a citizen very different from welfare, housing, police protection and other such governmental services. Even before the United States as we now know it was formed, the Continental Congress, operating under the Articles of Confederation, required in the

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[12] This point could hardly be made more succinctly than it has been by the State of Florida, Fla. Stat. Ann. § 299.01: "Public education is basically a function and responsibility of the state."

Northwest Ordinance of 1787 that "schools and the means of education shall forever be encouraged." 1 U.S.C. pp. xxxviii-xxxix. As noted above, 48 of the 50 States require in their Constitutions that the legislature establish and maintain a system of public education. Only one State (New York) requires in its Constitution that the State government provide any service other than education (welfare). Furthermore, less than half the State Constitutions even make specific mention of any other services which the State may elect to provide. In addition, every State but one requires compulsory school attendance of its children.[13] Thus, the unique place of education in America is secure: education, and only education, is a right of American children guaranteed by virtually every single State.

C. EDUCATION IS INTIMATELY BOUND UP IN THE DEMOCRATIC POLITICAL PROCESS

One need only look at the State Constitutions to discover why education is treated so differently from all other services provided by the States: education has always been considered to be a necessary part of the democratic political process, a support without which the political system of the United States could not stand.[14] Thus, like the Texas constitutional provision

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[13] *See* the table reproduced as an Appendix to this brief. Mississippi repealed its compulsory attendance statute in an attempt to avoid the impact of Brown v. Board of Education, *supra*.

[14] Interestingly, Virginia historically recognized the special relationship between voting and education by providing that two-thirds of its poll tax be used "exclusively in aid of the public free schools." Constitution of Virginia, Article VIII, § 173. *See* Harper v. Virginia State Board of Elections, 383 U.S. 663, 664 n.1 (1966).

quoted at pages 2 and 6, *supra*,[14a] the following provision of the Minnesota Constitution is typical:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools. Constitution of Minnesota, Article VIII, § 1.

This Court has also recognized the special role of education in our democratic society:

> Thomas Jefferson pointed out early in our history that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions. *Wisconsin* v. *Yoder*, 92 S. Ct. 1526, 1536 (1972).

Indeed, Mr. Chief Justice Burger in *Yoder* noted that a figure no less influential than Thomas Jefferson even proposed to condition citizenship on the ability to read. *Id.* at 1538 n. 14.

In a concurring opinion in *Yoder*, quoting *Brown* v. *Board of Education, supra*, Mr. Justice White reaffirmed that:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expendi-

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[14a] *See also* Texas Education Code, Acts of 1969, Ch. 889, § 2.01 which provides:

> The objective of State support and maintenance of a system of public education is education for citizenship and is grounded upon a conviction that a general diffusion of knowledge is essential for the welfare of Texas and for the preservation of the liberties and rights of citizens.

> tures for education both demonstrate our recognition of the importance of education to our democratic society.... It is the very foundation of good citizenship.

Id. at 1544. See also *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 231 (1948) (Mr. Justice Frankfurter, concurring); *cf. Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

Thus the States, though their Constitutions, and this Court, through its decisions, have enunciated the same conclusions as those who have conducted empirical studies of the relationship between voting and participation in the political process, on the one hand, and education, on the other: a citizen's willingness and ability to participate in the civic and political life of these United States is uniquely dependent upon education.[15]

Amici believe, therefore, that education's special relationship to the political process, recognized by the States themselves, makes education a uniquely important State function which is distinct from all other State services of whatever nature.

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[15] Scholars whose studies have led to this conclusion include J. Guthrie, G. Kleindorfer, H. Levin & T. Stout, Schools and Inequality 165-67 (1971), reprinted in Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 92nd Cong., 1st Sess., pt. 16C, Appendix I, pp. 7068-70 (1971); R. Hess & J. Torney, The Development of Political Attitudes in Children 217-18 (1967); R. Agger & V. Ostrom, *Political Participation in a Small Community*, in H. Eulau (ed.), Political Behavior 138-48 (1956); and A. Campbell, *The Passive Citizen*, Acta Sociologica, Vol. VI, No. 1-2 at 9-21 (1962).

Voting statistics which demonstrate the same result have been compiled by the United States Department of Commerce, Bureau of the Census, *Years of Schooling Completed—Reported Voter Participation in 1968 and 1964*, Current Population Reports, Series P 20, No. 192, Table 11 (1968).

II. THE TEXAS SCHOOL FINANCING SYSTEM IS DISCRIMINATORY

On its appeal, Texas does not dispute, as it could not, that its financing system provides substantially more money per child to property-rich than to property-poor districts. Instead, Texas and its supporters [16] maintain that the fact that under the present system the rich districts receive two or three or even ten times as much funding per student as do their poorer brethren is irrelevant because there is no showing that money makes a difference in the quality of the education furnished to school children. (App. Br. 5, 16-25).

A. EQUALITY OF EDUCATIONAL OPPORTUNITY IS TOTALLY UNRELATED TO STUDENTS' SCORES ON STANDARDIZED TESTS

As other Amici point out, much of the argument Texas makes on this point is based on its misreading of the relevant educational literature.[17] Far more importantly, however, Appellants are confusing State input into the public schools (in the form of funds) with a particular type of output of the schools (students'

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[16] It is noteworthy that the Amici filing briefs in support of Appellants herein consist entirely of two categories—the first is State Attorneys General, who are required as their States' chief legal officers to defend State laws against constitutional attack, and the second is the legal officers representing a selection of the richest school districts in the nation, *e.g.*, Beverly Hills and San Marino, California, Grosse Point and Bloomfield Hills, Michigan, and Montgomery County, Maryland.

[17] See Briefs Amicus Curiae of the National Education Association, et al. [hereinafter cited as NEA Brief] and John L. Serrano, Jr., et al. [hereinafter cited as Serrano Brief]. *Compare,* Office of Education, Equality of Educational Opportunity 316 (1969) (The Coleman Report) *with* Report of Commissioner's Ad Hoc Group on School Finance, Department of Health, Education and Welfare, in Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 92nd Cong., 1st Sess., p. 8388 (1971).

scores on standardized tests). While perhaps a relevant indicator in some cases of the effectiveness of public school education, test scores are simply not relevant to a determination of whether children are being afforded equal educational opportunity by a State. On the other hand, there is no doubt whatever as to the direct relationship between expenditures and educational opportunities.[18] As the President's Commission noted:

> [M]oney builds schools, keeps them running, pays their teachers, and, in crucial, if not clearly defined ways, is essential if children are to learn. President's Commission xi.

B. DISCRIMINATION IN THE PROVISION OF FUNDS FOR EDUCATION IS THE CRITICAL ISSUE

There is an evident difference between wealthy and poor school districts. Wealthy districts often have well-trained and experienced teachers, modern, well maintained facilities, new and up-to-date textbooks, first class libraries, language laboratories, special art and music classes, experimental programs, and a host of other educational advantages. Poor districts frequently have under-trained and temporary teachers, dilapidated, often hazardous facilities, old textbooks, inadequate library facilities, no special classes or teachers

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[18] Indeed, Appellants cannot quite bring themselves to consistency in their argument that money is irrelevant in providing educational opportunities, for they point out as evidence of their concern for education that in the period of 1960-1970 the "increase in expenditures . . . [in Texas] was from $750 million to $2.1 billion, while the numbers of students increased only 37%, so that expenditures per student doubled from $416 to $855." (App. Br. 9). It is interesting that while the State found 1960's $416 per pupil too little, and hence more than doubled that figure by 1970, Plaintiffs' Edgewood school district reached $416 for the first time ever in 1970—and at that time was $439 below the State average. The figures are from Texas Research League, Public School Finance Problems in Texas 14 (1972).

for subjects such as art, music, or foreign languages, and overburdened administrators.[19] Any parent, any teacher, any student knows that in every one of the myriad of ways that distinguish a school from a place which merely serves to keep children off the street, money makes a critical difference. Regardless of whether Appellants acknowledge this, this Court already has.

In *Sweatt* v. *Painter,* 339 U.S. (1950), this Court was called upon to decide whether the two racially exclusive law schools provided by the State of Texas, one for whites only, one for blacks only, met the test of "substantial equality" as then required under the separate but equal doctrine. This Court held that the two schools were not substantially equal:

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [white only] University of Texas Law School is superior. What is more important the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close. *Id.* at 633-34.

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[19] *See generally,* Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972).

Sweatt is on all fours with the current case. Substitute "rich districts" and "poor districts" for "white" and "Negro," and replace "law school" with "public school" and we have the situation currently facing the nation's school districts. As this Court held in *Sweatt,* schools whose disparities are as severe as those listed above—which Appellants do not and cannot deny on the record before the Court—are unequal, and that inequality flows from one source: discrimination in funding due to existing public school finance systems such as that of Texas.[20]

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[20] Equally dispositive of Appellants' arguments as to lack of discrimination is this Court's decision in Gaston County v. United States, 395 U.S. 285 (1969). Gaston County sought relief from the provisions of the Voting Rights Act of 1965 which forbade the use of literacy tests under certain circumstances. The United States opposed the granting of relief on the ground that the reimposition of a literacy test would place a specially onerous burden on the black citizens of the county, since the county had traditionally maintained separate and inferior schools for blacks.

This Court affirmed the lower court's refusal to allow Gaston County to reimpose a literacy test, finding that the black schools had been inferior to the white schools. The Court based its conclusion on several findings:

1. the property tax base of the white schools was from two to five times that of the black schools (here wealthy Alamo Heights has over 6 times the property tax base of Plaintiffs' Edgewood district, App. 216, and variations of as much as 23 times in property tax base between districts occur elsewhere in Texas);

2. the teachers in the black schools were less qualified than those in the white schools, since 95% of the black but only 5% of the white teachers had emergency credentials (here the Plaintiffs' Edgewood district had 47% of its teachers on emergency certificates, while the wealthy Alamo Heights district across town had only 11%, App. 117); and

3. the salaries of the black teachers ranged around 50% of those of the white teachers (here Edgewood's salary scale was consistently around 80% of Alamo Heights', App. 118).

The similarities to the present case are striking.

C. A CORRELATION BETWEEN THE POVERTY OF A SCHOOL DISTRICT AND THE POVERTY OF ITS RESIDENTS NEED NOT BE ESTABLISHED TO SHOW UNCONSTITUTIONAL DISCRIMINATION

Appellants argue that the findings of the court below really show only a discrimination against school districts rather than against individuals [21] and that there-

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[21] In fact, the court below found, based upon the evidence in the record before it—evidence which Appellants did not at the time contest—that in Texas the rich districts have the highest median family income and the poor districts the lowest. 337 F.Supp. at 282; App. 259.

In their attempt to do on appeal what they could not or would not do before the trial court, Appellants rely on S. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano v. Priest *and Its Progeny,* 120 U. Pa. L. Rev. 504 (1972), to attack the affidavit testimony of Joel S. Berke (App. 198). Professor Berke's affidavit demonstrated that, in Texas at any rate, property-rich districts and high family income go hand in hand. In his attack on the undisputed evidence before the court below, Professor Goldstein failed to note that, while the number of districts in the top (rich) and bottom (poor) categories is small, the number of students involved is not: the four poorest districts in the sample used by Professor Berke had over 50,000 students, 10% of the students in the entire sample. Furthermore, the direct correlation between district wealth and familial wealth remains in effect when the lines are redrawn to leave 20% of the students in the top category (i.e., richest school districts) and 20% of the students in the bottom category (poorest districts). In short, the statistical correlation between rich districts and family wealth is true for all the districts at the top and bottom of the wealth chart. Hence the study supports quite adequately the court's finding that there is an affirmative correlation between poor districts and poor people.

The attempts by Appellants to introduce new evidence before this Court illustrate perfectly the problems created when a party asks an appellate court to rely upon evidence not in the record. Not only does this tactic preclude the opposing party's effective rebuttal of the newly offered evidence, it allows the moving party to choose unrepresentative bits and pieces of the story. Here, for example, the Appellants rely on an article in the Kansas Law Review as demonstrating the absence of a relation between school district and

fore the court below was unjustified in holding such discrimination a violation of equal protection. (App. Br. 30-31). Despite Appellants' arguments to the contrary, the fact that the State has created and maintained a system which discriminates against groups rather than against specific individuals does not render such discrimination acceptable under the decisions of this Court. For it is not, and never has been, a principle of constitutional law that the State may freely discriminate against a variety of individuals if only it divides them into districts or groups.

For example, in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court struck down a legislative districting system which gave additional power to rural areas through a county representation system. "One part of the State" was given greater representation than "another part of the State." *Id.* at 562. The vice there was that the State system favored one district at the expense of another. Of course, the Court recognized in *Reynolds* that the real parties in interest, as here, were people—there voters, in the case at bar school children and taxpayers—since the ultimate weight of discrimination against groups is borne by their members. *See also Gray* v. *Sanders,* 372 U.S. 368 (1963).

Equally illustrative is *Bullock* v. *Carter,* 405 U.S. 134 (1972). There the State of Texas had established a system of filing fees requiring candidates for office

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individual wealth. (App. Br. 22-23.) Yet Appellants fail to mention that an authoritative study done in 1970, and repeated in 1972, by the Pennsylvania Department of Education showed a 96% correlation statewide between school district and individual wealth. Report of the Pennsylvania Department of Education, Bureau of Educational Research (May 1970); Report of the Pennsylvania Department of Education, Bureau of Educational Research (August 1972).

to pay up to $8,900 as a prerequisite for appearing on the ballot. The Court, in rejecting the State's argument that no discrimination against identifiable individuals was involved, struck down the statutes at issue on the ground that they discriminated against "the voters supporting a particular candidate" who could not afford the filing fees, despite the absence of "discrete and precisely defined segments of the community" who could be identified as the victims of the discrimination. *Id.* at 144.

And in *Gordon* v. *Lance,* 403 U.S. 1 (1971), this Court in describing *Cipriano* v. *Houma,* 395 U.S. 701 (1969), and *Gray* v. *Sanders, supra,* stated that the "defect" in the statutory systems there at issue "lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership. . . ." *Id.* at 4.

Thus, as the Court has recognized, the discrimination against a group is, in effect, discrimination against each of its members because of their membership in the group.

III. THE DISCRIMINATION AT ISSUE REQUIRES CLOSE JUDICIAL SCRUTINY

Appellants and their supporters contend that the court below erred in applying a "compelling interest test" in determining whether the discriminatory school financing system they defend amounts to "invidious discrimination" in violation of the Fourteenth Amendment of the Constitution of the United States. They maintain that the discrimination involved herein should be subject only to a so-called "rational basis" test. (App. Br. 26-37.) Thus the Court is presented with pages of argument aligning the "compelling interest"

cases [22] on the one side and the "rational basis" cases [23] on the other, with the Appellants attempting to distinguish the one from the other according to this label or that.

But this Court's sophistication with equal protection issues has gone beyond that point. For the real question, as this Court has indicated, does not depend upon attaching labels but upon the delicate balancing of interests required by the Constitution. Thus, the proper question to be asked in determining whether Texas' discriminatory system can pass constitutional muster is threefold, for the inquiry concerns:

> the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. *Dunn* v. *Blumstein,* 405 U.S. 330, 335 (1972).

See also Weber v. *Aetna Cas. & Sur. Co.,* 92 S. Ct. 1400 (1972); *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Carrington* v. *Rash,* 380 U.S. 89 (1965).

Amici have discussed above the interests affected by the classification (education) and the character of the classification (school district wealth).[24] It remains to examine the governmental interests asserted in support

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[22] *E.g.,* Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia State Board of Elections, *supra;* Bullock v. Carter, *supra.*

[23] *E.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); James v. Valtierra, 402 U.S. 137 (1971); Jefferson v. Hackney, 92 S.Ct. 1724 (1972).

[24] As indicated above, Appellants appear to argue that the applicable "classification" is not wealth but geography. App. Br. 20. Amici are not interested in debating the point, since both classifications are equally objectionable. *See* Reynolds v. Sims, *supra;* Gray v. Sanders, *supra;* Bullock v. Carter, *supra.*

of the classification against the background of the discriminatory provision of educational opportunities on the basis of school district wealth. Before doing so, however, it is necessary to discuss the substantiality of the State interests required in order to justify the discrimination.

Amici have demonstrated the relation of education to voting and the political process, a relation historically accepted by all the United States, and the unique place of education in our society. Others argue, Amici think persuasively, that education is a "fundamental interest."[25] Amici have also demonstrated that the discrimination involved here—the provision of more money to the children of rich school districts than to the children of poor ones—is substantial. This court has held such wealth discriminations to be "suspect." *Harper* v. *Virginia State Board of Elections, supra.* However, Amici do not believe that the resolution of this case turns upon whether education is found to be a "fundamental interest" or whether classification according to school district wealth is held "suspect."

The critical point is that education as a governmental function is singularly important to the political process and, as a result, is unique in its history and treatment by every State. Education is thus in a vastly different position from all other government "services," such as welfare,[26] housing,[27] fire or police protection, sanitation, and the like. In addition, the discrimination against the children resident in poor school districts

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[25] *See* Serrano Brief.

[26] *See* Jefferson v. Hackney, *supra;* Dandridge v. Williams, *supra.*

[27] *See* James v. Valtierra, *supra.*

is substantial and based upon a factor—wealth—completely extraneous to educational considerations. At the very least, such a serious discrimination in the provision of education deserves and requires that this Court look carefully into the rationale asserted to justify the discrimination. And upon such an examination, it becomes clear that Texas not only would serve no "compelling interest" by preserving its present discriminatory school financing system, but that it would serve no rational interest at all.

IV. TEXAS HAS NO INTEREST—COMPELLING OR OTHERWISE—IN PRESERVING THE PRESENT IRRATIONAL AND DISCRIMINATORY SCHOOL FINANCING SYSTEM

In all the various briefs filed by Appellants and the Amici who support them, there is no attempt made, for obvious reasons, to explain the desirability or sense of providing funds for education so that children who live in rich districts receive more money to spend on education (even though their parents make less tax effort), while children who live in poor districts receive less money (even though their parents try harder). Instead, the Appellants now advance the claim that the discriminatory system is justified because it is necessary to provide "local autonomy" and "local control." Under this argument, the existing system, with all its attendant inequities, is required in order to effectuate the State's purposeful decentralization of public education. The facts are otherwise.

A. THE PRESENT SYSTEM IS IRRATIONAL AND UNWORKABLE

In connection with their contention that the present system is necessary for local control of the schools, Appellants assert that "The Texas plan is not the re-

sult of happenstance." (App. Br. 37). However, an analysis of the evolution of the Texas system reveals that it—along with the educational financing systems of most other States—is in fact the product of virtually complete happenstance.

Texas adopted a system of local financing of schools in the last century when this nation was of substantially different composition than it is today. In the nineteenth century, inequalities in wealth among school districts were not pronounced and the expenditures required for education were comparatively modest. Therefore it is conceivable that local funding may have once made a good deal of sense. The coming of industrialization and mechanization in the twentieth century changed all that rapidly, however. In the space of a few decades there were vast differences in ability to support the schools where there had been few before.[28]

By the 1920's it was commonly recognized by educators that something had to be done to prevent the total collapse of the States' school financing systems. For already the pattern later to emerge fully was becoming clear: attempting to rely wholly on local districts to finance public education could not work. The pioneering work done by Strayer and Haig in 1923,[29] cited by Appellants to suggest that the current system is the result of repeated studies (App. Br. 36), came to the conclusion that the States had to "equalize" the vast inequities arising from the basic local property tax-based system.

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[28] E. Fuller & J. Pearson, Education in the States: Nationwide Development Since 1900, p. 204 (1957).

[29] G. Strayer & R. Haig, Financing of Education in the State of New York (1923).

The "foundation programs" resulting from the Strayer-Haig study may well have constituted an "enlightened approach" in the 1920's when they were first developed, particularly in contrast to what came before, but that in no way suggests that the crazy-quilt patchwork system that we now see was purposefully or rationally created.

By way of illustrating the irrationality of the present system, which Appellants suggest reflects the "judgment" of "legislative bodies" as to "wise policy" (App. Br. 25), let us assume that a State legislature wished to start from scratch to devise a program to finance public education in the State. If the legislature started from the proposition that the State should provide a free public education to all its children, it is inconceivable that it would establish a system providing that the monies raised would be disbursed to the local units administering the schools in direct proportion to the value of the property within those units. Such a result would be inconceivable because there is no rational connection between the purpose for which the funds would be spent, namely, the education of children, and the value of real property in the geographic unit responsible for utilizing the funds to educate children.[30]

As the President's Commission has stated:

> The process by which funds are raised and distributed for public education throughout the

[30] The result would be even more clear where the geographic units were school districts, the boundaries of which have historically often been motivated by economic, racial or political considerations having nothing whatsoever to do with any legitimate educational purpose, let alone the raising of tax monies. *See* United States v. Texas, *supra*.

> United States has, during the past century, evolved into a dense jungle of legislation, formulas, and procedures. More than that, whatever its initial intentions and results, it is no longer effective or equitable by the present criteria we apply to measure public purposes. President's Commission 26.

Thus it is clear that the present discriminatory system is in no meaningful sense the product of a "policy" of "legislative bodies." Rather it is the ultimate in sheer happenstance, a product of historical accident. In fact, the Texas Governor's Committee on School Finance observed that the present system "almost defies comprehension" and is based upon factors "a little better . . . than sheer chance, but not much."[31] Indeed, as a recent report dealing with another State's similar system of financing concluded:[32]

> It is difficult to conceive of a less workable structure, fraught with such possibilities for inaction and lack of focus for leadership, than the one existing at the state level in education.

B. UNLIKE THE PRESENT SYSTEM, THE SYSTEMS PERMITTED BY THE LOWER COURT DECISION WOULD NOT INHIBIT LOCAL CONTROL OF EDUCATION

1. Under the Present System, Local Control Exists Only for the Rich Districts

The present system of school finance is not necessary for local control of the schools. In fact, the exact opposite is true: the present system prevents meaningful local control by all except the richest districts.

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[31] Public Education in Texas, 57, 48.

[32] Office of Planning Coordination, Michigan Bureau of Policies and Programs, A Chronology of Educational Reform 1 (1970).

Texas, like other States, has created school districts and made many of them poor:

> [T]he case [is] unusual in the extent to which governmental action *is* the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California Constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the State, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity.... Governmental action drew the school district lines, thus determining how much local wealth each district would contain.... *Serrano* v. *Priest,* 5 Cal. 3rd 584, 487 P.2d 1241, 1254 (1971).[33]

Having created and perpetuated rich and poor districts, the State then leaves it to such districts to go beyond the amount of the direct State grants "as their desires and resources permit." (App. Br. 6). This, according to Appellants, is the essence of local control.

The facts belie this contention. Plaintiffs' Edgewood district, taxing at the highest rate in San Antonio, was able to raise $37 per student in 1969-70. Even with the State direct grant of $242 per pupil, Edgewood had less than half the funds available per pupil as did the average Texas school district.[34] As a result of its poverty, Edgewood could not provide such essentials as adequate classrooms, sufficient library resources, or experienced teachers, and the district had to forego

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[33] *See also* Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D. Minn. 1971).

[34] *See* notes 3 and 18, *supra.*

programs available to richer districts.[35] This occurred despite the fact that Edgewood's tax rate was the highest in its area. It was not Edgewood's "desire," or the "lack of concern" on the part of Edgewood parents, which made Edgewood unable to afford what the richer districts had. It was, quite simply, poverty.

In contrast, Alamo Heights, a wealthy district also in San Antonio, although taxing itself at a lower rate than did Edgewood, raised $412 per student and, in addition, received $250 in direct state grants in 1969-70.[36] Alamo Heights could afford the luxury of local control, of deciding where to spend the funds the State of Texas has given it. Edgewood had no such luxury. The simple fact is that the image of local control over financing of education is completely illusory for a district such as Edgewood because of its poverty.

Nevertheless, Appellants contend:

> The Court below thought that the choice Texas gives to school districts was illusory since "poor" districts in reality have no choice. Even though they tax themselves heavily they cannot raise much money (337 F.Supp. at 284, App. 259). But this is not like *Hargrave* v. *Kirk*, 313 F.Supp. 944 (M.D. Fla. 1970), *vacated* 401 U.S. 476 (1971), where the state made it impossible as a matter of law for a poor family or school district to provide an expensive education. Here the state has assured every child in every school district an adequate education. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much. In fact, every district in the state does go beyond the minimum

[35] App. 236-38.

[36] *See* note 3, *supra*.

foundation program (App. 57). Thus the people of each district do in fact have a choice and have exercised it. (App. Br. 35.)

Contrary to Appellants' assertions, the present case is identical to *Hargrave*. In addition to making it impossible "as a matter of law" for a poor school district to provide a quality education,[37] Texas, like most other States, has made it impossible as a matter of fact by creating and maintaining property-poor school districts.

2. The Systems Permitted by the Decision of the Court Below Allow Local Control for All Districts

Under the standard proposed by the court below (whether labelled "fiscal neutrality" or something else), there are many ways in which Texas, or any other State, could structure its educational finance system so as to leave financing at the local level and at the same time eliminate the present interdistrict discrimination. Under the rule adopted by the court below, of course, this type of decision is, as it should be, left to the State.

One method by which a State could retain local level financing is the so-called district power-equalizing approach whereby the State would guarantee all the dis-

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[37] Texas, like Florida, imposes legal restrictions on the poor districts' ability to raise funds through the mechanism of statutory maximum limits on the tax rates which local districts may impose for education. The statutory maximum allowed for local taxing efforts varies according to the size of the school district, but is in most cases around $1.75 per $100 assessed valuation. Tex. Stat. Ann. arts. 2802g, 2802h, 2802i, and 2802i-1—2802i-32, as amended by Acts of 1969, Ch. 889. Needless to say, such limits weigh lightly on the rich districts which can obtain substantial revenues at low rates.

tricts the same amount of revenue for any given level of tax effort.[38] Another method would be for the State to reapportion the local districts so that the value of taxable property within each district is approximately the same.[39] Yet a third approach would be for the State to remove commercial, industrial and mineral property from the local tax roll, tax such property on a statewide basis, and return the revenues to the local districts in a manner intended to equalize the disparities

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[38] For a fuller description of how this system would work, *see* J. Coons, W. Clune & S. Sugarman, Private Wealth and Public Education 201-42 (1970). Appellants argue that this would be politically unattainable because the richer districts would block any changes in the financing system which operated to reduce the revenues which they can obtain for education without making comparatively greater tax effort. Credibility is lent to this argument by the fact that it is precisely the political power of the richer districts coupled with the benefits they obtain from the existing system that is responsible, as Amici have discovered in their attempts to achieve reform of educational finance in their States, for the perpetuation of the existing discrimination against poorer districts. However, if the richer districts block enactment of legislative programs aimed at leaving financing of education at the local level while eliminating discrimination in its results, the responsibility for any resulting loss of local control will fall on the very same rich districts which seek to defend the present system by contending that its elimination will destroy local control. Appellants' position thus reduces itself to the proposition that if the courts eliminate the unjustifiable benefits the rich districts obtain from the present system, those rich districts will, in response, destroy local control of public education.

[39] Appellants object that this method is impossible and not to be taken "seriously." (App. Br. 14). In fact, this type of reapportionment is taking place continuously as the number of school districts declines around the country. *See* National Education Finance Project, Alternative Programs for Financing Education 104-05 (1971). Indeed, the State of Texas routinely makes calculations of similar complexity in conjunction with its current "foundation" program. See Public Education in Texas 45-58.

arising from variations in the value of the residential property remaining in the local tax base. Other methods involving various combinations of the above with State equalizing funds obtained from sources other than local property taxes could be enumerated at length. All of these preserve local control, yet are consistent with the provision of a nondiscriminatory education.

To be sure, it is up to the State under the lower Court's decision to determine whether education shall be financed or controlled locally or on a statewide basis. However, as Amici have pointed out above, school districts are now and always have been mere instrumentalities of the State. Since any State could choose at present to finance education on a statewide basis and since the lower court decision does not oblige a State to finance education in any particular manner, it is difficult for Amici to understand why any decisions which States might make in the future to finance education on a statewide basis can be considered to be a reduction of local autonomy compelled by the decision in this case.

In any event, State decisions as to school finance systems do not go to the heart of local control. As this Court has recognized, local control of the public schools has numerous advantages in that it allows those who best know how the schools are operating to determine those aspects of the operation of the schools which can and should vary according to local conditions. *Wright* v. *Council of the City of Emporia,* 92 S. Ct. 2196, 2206 (1972). Amici do not disagree with this premise. However, even if a State should elect to finance education on a statewide basis, that would not affect local control over such things as "curricular decisions, the

structure of grade levels, [and] the planning of extracurricular activities. . . ." See *Id.* at 2211 (dissenting opinion of Mr. Chief Justice Burger). Nor would full State funding of education affect local decision-making power over personnel decisions, administration of the schools, or the allocation of the district's revenue among different educational objectives. In sum, even a State takeover of educational finance need not reduce local control over the public schools.

As Amici have shown above, Texas' current system of school finance does not promote local control of public education and, furthermore, is neither rational nor workable. In fact, the current system, by depriving poor school districts of the funds to pursue programs readily available to the rich districts, precludes the poor districts from enjoying the benefits of meaningful local control. On the other hand, the rule adopted by the court below is not only educationally sound and rationally based, but allows both the rich and poor districts the benefits of local control. It is evident, therefore, that Appellants' arguments that the State is pursuing the valid interest of promoting local control in maintaining its discriminatory finance system are entirely devoid of merit.

Accordingly, the State has no interest—compelling or otherwise—to justify providing educational opportunities in a discriminatory manner based upon district wealth. In view of the educational interests and the nature of the discrimination involved, under the established constitutional principles discussed earlier this Court must conclude that the Texas school financing system is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

V. APPELLANTS' CONTENTIONS AS TO THE CATASTROPHIC EFFECTS OF AN AFFIRMANCE OF THE LOWER COURT DECISION ARE WITHOUT MERIT

The foregoing analysis has demonstrated that the Texas school finance system is, as the lower court held it to be, unconstitutional. Appellants and the Amici supporting their position, however, seek to avoid the impact of the constitutional requirements by assertions that an affirmance of the lower court decision would have catastrophic effects on State public education. Amici are in a particularly good position, as State Governors active in the area of school finance reform, to evaluate the accuracy of these predictions and have no hesitation in stating to this Court that such predictions are without merit. Appellants, and their supporters, make the following arguments, which Amici will discuss seriatim:

1. Appellants maintain that nondiscrimination would require a tremendous increase in educational expenditures. App. Br. 39-40; Brief Amicus Curiae of Montgomery County et al. 99-102 [hereinafter cited as Montgomery County Brief].[40] This is not so. While it is true that if a State chooses to equalize all schools at the level of spending now enjoyed only by the wealthiest districts there would be an increase in educational outlays—although not a tremendous one—a State is free to choose the level of equalization to insure that there is little cost increase. The President's Commission on School Finance has recently completed a study of this subject which included a thorough analytical treatment of the cost factors involved.

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[40] Inconsistently, certain Amici also argue that the decision below will result in less funds being spent on education with resulting "enforced mediocrity" for the public schools. Montgomery County Brief 48-54. There is no justification in the record, or otherwise, for such a contention.

According to the President's Commission, Texas, which currently spends over $1.5 billion annually on its schools, would increase costs no more than $40 million by converting to equalized schools if it chose to equalize payments at the 50th percentile.[41] This amounts to an increase of around 2.6%—less than that required annually from inflation alone. Nationwide the figures are similar. Thus, in the United States, which spends $45 billion annually on education,[42] the additional costs involved in equalizing at a 50th percentile level amount to $1.3 billion, an increase in outlay of less than 3%. Of course, if States choose to equalize at higher levels—that is, in Appellants' terms, decide to make high quality education available for all—the costs will increase. But even so, the increases required are not prohibitive. Thus, if Texas chooses to equalize at the 70th percentile, its increase in costs would be $92 million (6.1%) and at the 90th percentile that increase would be $263 million (17.5%). Similarly, nationwide, the cost if all States choose to equalize at the 70th percentile would increase by $2.5 billion (6%) and at the 90th percentile by $6 billion (15%).[43]

While Amici do not submit that these are necessarily small figures, they do show that the order of magnitude of expenditures necessary to equalize our schools even at the level of the very best is not overwhelming and that to maintain a school system in which the overall quality is higher than the average now but which does not discriminate against poor districts need cost almost nothing more than we are presently paying.

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[41] 2 Staff Report, President's Commission on School Finance Reform, Review of Existing State School Finance Programs 15 (1972) [hereinafter cited as Staff Report].

[42] President's Commission 11.

[43] Staff Report 15.

2. Appellants also contend that an equalized educational finance system would not reflect local variations in such things as the cost of educational facilities, the needs of disadvantaged or exceptional students for special facilities, the local tax burden for services other than education, and the like. In this connection, Appellants are particularly solicitous for the situation of the cities which, Appellants claim, will actually lose educational revenues under an equalized system.

Concededly, under the standard adopted by the court below, it is possible that a State could choose to adopt a system of public school finance that did not give weight to any of the above-specified variables. However, Amici, as Governors familiar with and active in the areas of school finance reform, believe that while such a result is conceivable, it is much more likely that any school financing system enacted to comply with the standard adopted by the court below will embody the type of sophisticated attempt to rationalize educational financing exemplified by the proposed California statute reproduced as Appendix B to the Brief Amicus Curiae of Richard M. Clowes, et al. In any event, the present Texas system takes into account none of the factors listed by Appellants, and it is difficult to see what legitimate State interest is furthered by perpetuating a demonstrably irrational system of school financing on the ground that its replacement, while of necessity a significant improvement, might not be ideal from some points of view.

3. Appellants also raise the spectre of a mass flight from the public schools by the children of those who already object to having their children attend school with blacks and other members of minority groups. (App. Br. 46-47; Montgomery County Brief 51). Not

only is it singularly unattractive to propose that this Court trade off wealth discrimination in exchange for eliminating racial discrimination,[44] but this contention is factually erroneous.

First, perpetuating discrimination against the poor in educational financing will hardly promote the use of the public schools to achieve "a society that is not divided by artificial barriers of race or class or wealth." (App. Br. 47). On the contrary, it is precisely the existence of school districts in which high property values, low tax rates and ample funding for public education coincide that is the principal cause of the creation of residential enclaves from which the black and the poor are excluded. Second, as the attempts to avoid desegregation have shown, the fact that persons who place their children in private schools are still taxed to support public schools operates as a substantial deterrent to "flight away from the public schools" by all but the richest.

In closing this section of their Brief, Amici would re-emphasize that the constitutional standard adopted by the court below—correctly in our view—does nothing more than require the State to stop using a system which discriminates against the children residing in poor districts. It does not require that the State util-

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[44] This Court has heard similar arguments before. In Monroe v. Board of Commissioners, 391 U.S. 450 (1968), the defendant school district attempted to justify its operation of a free transfer system which resulted in the maintenance of segregated schools. This Court stated that:

> We are frankly told that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Id.* at 459.

ize any particular means of financing. Rather, it sets forth the basic constitutional standard and quite properly leaves it to the State to make the policy decisions as to which of the many possible methods of school financing it will adopt.

Consistent with the decision of the lower court, there are many financing arrangements the State could adopt. The basic structures of some of these variations include:

1. A uniform formula, whereby the State grants each district the same amount per pupil;
2. "Power equalizing," whereby the State assures that each district receives equal funds for equal local tax effort;
3. Variation by cost of services, whereby the State pays more to those districts (generally urban ones) where costs are higher;
4. Combination formulae, whereby the State pays either a uniform amount under formula 1 or variable amounts under formula 3 and allows the districts additional leeway to spend more, for example, under formula 2.

The four types of formulae mentioned above are merely a few of those available. There are, in addition, many other factors that the State could consider in adopting a particular financing program. These include variations in educational need (such as programs for the handicapped), educational innovation and experimentation, and municipal overburden (that is, since urban areas are harder pressed to provide all the necessary municipal services than are rural areas, the urban areas

may require additional aid). None of the formulae suggested above, nor the variations thereon, are of great administrative difficulty and any of them could, based upon a State's policy decision as to how best to spend the funds available to it, form the basis of an adequate and constitutional school financing system.

CONCLUSION

The principal interest of Amici in filing this brief is to insure that this Court in the present case does not, in effect, endorse the existing defects in the financing of public education in the various States, including those governed by Amici. Amici believe, and the court below recognized, that the discrimination against poor children which results from such a system of school financing is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and must be eliminated. Each Amicus herein is presently engaged in drafting and seeking the passage of legislation which would eliminate this discrimination against poor children. While constitutional law obviously cannot be made for the purpose of supporting legislative reform efforts, it is equally true that constitutional law should not thwart such efforts, particularly where, as in the present area of school financing, the absence of legislative reform is attributable to the entrenched political power of persons who most benefit from the inequalities of the status quo. As Amici have pointed out elsewhere in this Brief, the standard applied by the lower court allows many possible school financing systems, the details of which are properly to be filled in by the State according to its policy determinations. For the foregoing reasons,

Amici believe that the decision of the court below is correct and should be affirmed by this Court.

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APPENDIX

APPENDIX

APPENDIX

Table of State Provisions on Education and Other Services

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
Alabama	Yes		Yes	No	Hospitals & Welfare
Alaska	Yes		Yes	No	No
Arizona	Yes		Yes	No	No
Arkansas	Yes	Yes	Yes	No	No
California	Yes	Yes	Yes	No	Welfare
Colorado	Yes		Yes	No	No
Connecticut	Yes		Yes	No	No
Delaware	Yes		Yes	No	No
Florida	Yes	Yes	Yes	No	Health
Georgia	Yes	Yes	Yes	No	Slum Clearance
Hawaii	Yes		Yes	No	Welfare & Slum Clearance
Idaho	Yes	Yes	Yes	No	No
Illinois	Yes	Yes	Yes	No	No
Indiana	Yes	Yes	Yes	No	Welfare
Iowa	Yes		Yes	No	No
Kansas	Yes		Yes	No	Welfare
Kentucky	Yes		Yes	No	No
Louisiana	Yes		Yes	No	Welfare
Maine	Yes	Yes	Yes	No	No
Maryland	Yes		Yes	No	No
Massachusetts	Yes	Yes	Yes	No	No

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
Michigan	Yes	Yes	Yes	No	No
Minnesota	Yes	Yes	Yes	No	No
Mississippi	No[a]		No[c]	No	Health
Missouri	Yes	Yes	Yes	No	Welfare
Montana	Yes		Yes	No	No
Nebraska	Yes		Yes	No	No
Nevada	Yes	Yes	Yes	No	Welfare
New Hampshire	Yes	Yes	Yes	No	No
New Jersey	Yes		Yes	No	No
New Mexico	Yes		Yes[d]	No	Welfare
New York	Yes		Yes	Welfare	Housing
N. Carolina	Yes	Yes	Yes	No	Welfare
N. Dakota	Yes	Yes	Yes	No	No
Ohio	Yes		Yes	No	No
Oklahoma	Yes		Yes[d]	No	Welfare
Oregon	Yes		Yes	No	No
Pennsylvania	Yes		Yes	No	Welfare
Rhode Island	Yes	Yes	Yes	No	No
S. Carolina	No[b]		Yes	No	No
S. Dakota	Yes	Yes	Yes	No	No
Tennessee	Yes	Yes	Yes	No	No
Texas	Yes	Yes	Yes	No	Welfare
Utah	Yes		Yes	No	No
Vermont	Yes		Yes	No	No
Virginia	Yes		Yes[d]	No	No

	Education Constitutionally Mandated	Constitutional Recognition of Relation of Education to Voting	Compulsory Education Required by Statute	Other Services Constitutionally Mandated	Other Services Mentioned in Constitution
W. Virginia	Yes		Yes	No	No
Washington	Yes	Yes	Yes	No	No
Wisconsin	Yes		Yes	No	No
Wyoming	Yes		Yes	No	No

[a] Education formerly mandatory, Constitution amended after Brown v. Board of Education, *supra*, to make provision of educational services within the legislature's discretion.

[b] Education formerly mandatory, constitutional provision repealed after Brown v. Board of Education, *supra*.

[c] School attendance formerly compulsory, statute repealed after Brown v. Board of Education, *supra*.

[d] Constitutional provision.

IN THE

Supreme Court of the United States

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF:

NATIONAL EDUCATION ASSOCIATION

AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

NATIONAL CONGRESS OF PARENTS AND TEACHERS

COUNCIL OF CHIEF STATE SCHOOL OFFICERS

The above named associations hereby move pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief amicus curiae on the merits of the case at bar. Appellees have consented to the filing of this brief, but appellants have withheld their consent.

The associations joining in this motion represent educators and public officials who are directly involved in the

operation of the public schools and parents who actively participate in school affairs. These associations and their memberships are as follows:

National Education Association (NEA) is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million one hundred thousand regular members.

American Association of School Administrators (AASA) is a voluntary, nation-wide organization of school administrators. Its membership includes more than 18,000 school administrators.

National Congress of Parents and Teachers (National PTA) is a voluntary organization established to promote the welfare of children. Its membership, which is primarily made up of parents and teachers, is more than 8,500,000.

Council of Chief State School Officers (CCSSO) is an independent organization of the State Superintendents and State Commissioners of Education. Its membership consists solely of the chief state school officers of the 50 states and six outlying areas.

Each of these associations has a deep interest in fostering quality education and equality of educational opportunity. The case at bar touches directly upon these concerns. Moreover, this case bears directly upon the ability of our individual members to fulfill their professional goals as educators, administrators and public school officials.

In view of the substantial impact that this Court's decision may have on the professional interests of the associations and their membership, we desire to participate in this case. We believe we can be of service to the Court in identifying the close relationship between educational opportunity and other basic civil and political rights.

Moreover, since appellants have, for the first time in this litigation, argued that there is no significant relationship between cost and quality of education, we believe it would be useful to bring to the Court's attention the numerous studies demonstrating a positive relationship between the expenditures for education and the quality of education enjoyed by the child.

Wherefore, National Education Association, American Association of School Administrators, National Congress of Parents and Teachers and Council of Chief State School Officers request that this Court grant leave to file the accompanying brief amicus curiae in support of the judgment below.

Respectfully submitted,

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NATIONAL CONGRESS OF PARENTS AND TEACHERS

COUNCIL OF CHIEF STATE SCHOOL OFFICERS

STATEMENT

This case is before the Court on appeal to review the district court's holding that the Equal Protection Clause bars Texas from allocating funds for public education on the basis of wealth other than the wealth of the State as a whole.

The parties stipulated in the court below that the facts relevant to this case "are generally not in dispute"

(A.45).[1] The evidence presented to the lower court, for the most part, related to the operation of the laws governing school financing and the disparities in revenue available to the school districts.

A. The System of Allocating Funds in Texas.

The parties stipulated that "the duty to provide education pursuant to the Texas Constitution is a function of the State" (A.53). For its own "convenience" in maintaining public schools, the State has created "independent school districts" which are "political subdivisions of the State" (A.53). At last count the State of Texas was divided into approximately 1200 school districts (A.261). Generally the districts are not coterminous with municipal or county lines or any other political subdivision of the State. For example, there are seven school districts lying wholly or partly within the City of San Antonio and its environs (A.53).

1. *Revenue Derived from the School District:* Pursuant to Article VII, Section 3 of the Texas Constitution, school districts may tax real and personal property located within the district. In fact, virtually all of the revenues derived from within the district come from the real property tax.[2] The rate of tax which the school district is authorized to establish is fixed by statute, and any additional levy requires a majority approval by those voting in the district's bond election (A.329-30). Revenues collected by the school district "must be used solely within the district in which it is collected" (A.54).

2. *Revenue Derived from the State of Texas.* The State of Texas provides funds for the school districts under

[1] Citation is to Appendix. Appellants' brief will be cited as "App. Br." followed by the page reference.

[2] Plaintiffs Exhibit XVIIIc.

two major programs.[3] First, the Available School Fund provides a flat grant to every school district for each pupil in the district (A.70). In 1968-69, for example, the state paid each district $97.75 for every child in average daily attendance in the school district.[4] In actual effect, this program benefits only the richest school districts in the State because the flat grant is deducted from the amount each school district receives from other state programs which serve all but the richest districts (A.56).

The second, and more complex, grant program is the Minimum Foundation Program (MFP). One of the avowed purposes of the Foundation Program is to equalize, at least to some extent, the disparities in revenues available to the school districts from their property tax (A. 70-71). Most of the funds (about 80%) are paid out for teachers' salaries (A.249).[5]

Under the Foundation program the State determines the number of teachers and other professionals that will be needed by the school district on the basis of average daily attendance (A.249). The State then allocates funds for these teachers, taking into account the education and experience of the teachers employed in the school district. Thus, for example, a school district receives less for a first year teacher than for one in his fifth year of service, and less for a teacher with a bachelor's degree than for a

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[3] There are several minor programs usually available to the district on a matching grant basis. For example, the State provides for educational television in a participating school district on a matching grant basis. 5 Governor's Committee on Public School Education, *Public Education in Texas—The Financing System*, pp. 18-19 (1969) (Hereafter cited as "Governor's Committee").

[4] *Id.* at 35.

[5] In addition to the grants made for teaching and professional salaries, the Minimum Foundation Program pays a small amount to each school district for "operating costs" and "transportation costs" (A.249).

teacher with a master's degree.[6] Here again, the richer districts tend to be advantaged. Inasmuch as there is no upward limit on the amount a district may pay in salaries, the districts with greater financial resources, by paying larger salaries than the poorer districts, can and do attract teachers with greater experience and more advanced degrees (A.115-18). In that way the district qualifies for more funding under the Minimum Foundation plan (A.244).

Approximately 20% of the costs of the Minimum Foundation Program is paid by the local districts (A.250). In making up this 20%, a fixed sum or obligation is assigned to each county and each school district in the county is charged according to its pro-rata share of real property in the county.[7] The sum charged against the school district is then deducted from the MFP grant to the district.[8] In this respect the MFP affords some equalization of funding among the districts.

B. The Disparity of Funds Allocated for the Education of Texas Children.

1. *Funds Derived from Local Taxes.* As a result of the variations in property value among the school districts there is a marked variation in the amount of funds allocated per pupil among various school districts.

The cause and nature of variations in per pupil funding among Texas school districts is epitomized in the evidence relating to the seven school districts serving the

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[6] Texas Education Code §§ 16.301-312. A.249.

[7] Memorandum Brief of Defendants, p. 3. (This memorandum was filed in response to the court's request of September 5, 1969 for information relating to the manner in which funds are distributed under the Minimum Foundation Plan.)

[8] *Id.*

City of San Antonio.[9] For these school districts, market costs for school plant, supplies, and professional personnel are generally the same (A.53). The financial resources of these seven districts, however, differ significantly. In 1967-68 the market value of property per student in each of the seven districts was as follows (A.229):

MARKET VALUE OF PROPERTY PER STUDENT

Edgewood	$ 5,429
Northeast	28,317
Alamo Heights	45,095
San Antonio	19,659
Harlandale	10,463
Northside	20,330
South San Antonio	9,974

The revenue per pupil derived from the property by these seven school districts in 1967-68 was as follows (A.230):

PROPERTY TAX YIELD PER STUDENT

Edgewood	$ 21
Northeast	161
Alamo Heights	307
San Antonio	125
Harlandale	67
Northside	106
South San Antonio	88

The plaintiff's demonstrated that the differences in the per pupil revenue generated by the property tax in each of the seven districts spring from the value of the property therein rather than from the willingness of the residents to tax themselves for education. When the tax rates are equalized, *i.e.*, adjusted for comparison purposes to indicate the percentage of market value paid in

[9] The record contains a study of variations in per pupil funding among 110 Texas school districts. The variations in funding revealed in the 110 district survey correspond closely to the variations in funding in San Antonio. (A.197-210).

taxes,[10] the taxes paid per 100 dollars of property at market value in 1970 were as follows (A.226):

TAX RATE PER $100 AT MARKET VALUE

Edgewood	$1.05
Northeast	.90
Alamo Heights	.85
San Antonio	.76
Harlandale	.89
Northside	1.02
South San Antonio	1.00

Thus, in 1970 the poorest district, Edgewood, was taxing its property at the highest rate of the seven districts in San Antonio.

2. *Funds Derived from the State and Federal Government.* The disparity in revenues available to the school districts from the property tax are not ironed out by state and federal aid. While figures are not available for one of the seven districts in San Antonio (South San Antonio), the state aid per pupil for 1967-68 in the other six districts varied by only $28.00 per pupil between the richest and poorest of the six districts, whereas the difference between the property tax yield per student in Edgewood, the lowest, and Alamo Heights, the highest, was $286.00. Only federal aid affected in any meaningful degree the relative wealth and poverty of the six school districts, and even with the infusion of federal aid, the per pupil expenditure in the six districts showed a wide variation as indicated in the following table (A.219):

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[10] In Texas the school districts assess property values at rates lower than market value. The ratio of assessed valuation to market value differs among districts, as does the tax rate levied on assessed valuation. Accordingly, before interdistrict comparisons can be made, the tax ratio of the district must be adjusted to reflect the rate of tax on property at market value (A.226).

REVENUES OF SELECTED SAN ANTONIO SCHOOL DISTRICTS IN 1967-68

School Districts	Local Revenues Per Pupil [11]	State Revenues Per Pupil	State & Local Revenues Per Pupil	Federal Revenues Per Pupil	Total Revenues Per Pupil (State-Local-Federal)
Edgewood	$ 26	$222	$248	$108	$356
Northeast	$182	$233	$415	$ 53	$468
Alamo Heights	$333	$225	$558	$ 36	$594
San Antonio	$134	$219	$353	$ 69	$422
Harlandale	$ 73	$250	$323	$ 71	$394
Northside	$114	$248	$362	$ 81	$443

[11] The revenues per pupil reported in this column differ in minor amounts from those reported in the second table on page 5, *supra*. We understand that the differences arise because the computations in the table on page 5 are based on the absolute number of students enrolled in each of the school districts, whereas the computations in the above table are based on the number of students in average daily attendance in each school district. When average daily attendance figures are used, the number of students will be slightly lower than the actual number of students enrolled in the school district (A.135).

The variations in the revenue of the San Antonio school districts do not indicate that the educational needs of the children in these districts vary from one district to another. Defendants stipulated that "the educational needs of the children in the [other] named districts [of San Antonio] are no greater than the educational needs of the children in the Edgewood district" (A.54). Nevertheless, the educational offering in Edgewood, measured not only in terms of dollars but in results of dollars, is substantially inferior to the other districts in San Antonio.[12] For example, the State officially recognizes that those teachers teaching on "emergency permits" have "substandard preparation" for teaching (A. 117), and in the year 1966-67 Edgewood had a significantly greater percentage of teachers with substandard preparation than any other district in San Antonio (A.114, 117).[13]

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[12] The disparity in educational offering in the San Antonio schools is demonstrated, in part, by the comparison made between the offering at Edgewood (the poorest district in San Antonio) and that at Northeast (the second richest district in San Antonio). Edgewood's Superintendent testified that in terms of classroom space the Northeast children had an estimated 70.36 square feet per child, whereas Edgewood had an estimated 50.4 square feet per child (A.236). Northeast had 9.42 library books per child; Edgewood had 3.9 library books per child. Northeast had a teacher/pupil ratio of 1/19; Edgewood's ratio was 1/28. Northeast had one counselor for every 1,553 children; Edgewood had one counselor for every 5,672 children. And Northeast had educational television available; whereas Edgewood did not because it did not have the funds to meet the matching grant program. (A.236-38).

[13] The State did not produce figures beyond 1966-67 on the number of teachers in each district who are employed on the strength of emergency permits (A.117). But the record does show that for each of the academic years from 1967-68 through 1970-71, Edgewood's faculty had the highest percentage of teachers who had not earned a college degree (A.115, 181).

TEACHERS EMPLOYED ON EMERGENCY PERMITS

	Number of Teachers	Number of Teachers Holding Emergency Permits	Percent of Teachers Holding Emergency Permits
Edgewood	780	412	52.6%
Northeast	984	82	8.3%
Alamo Heights	248	28	11.7%
San Antonio	2746	478	17.1%
Harlandale	620	149	24.2%
Northside	508	109	21.2%
South San Antonio	245	99	40.1%

C. The Lower Court's Decision.

The district court found that the Texas financing system "makes education a function of the local property tax base" (A.261). The defect in the system is that the system "assumes" that the tax base of the various districts "will be sufficiently equal to sustain comparable expenditures from one district to another" (A.261). The evidence, on the other hand, demonstrated the contrary. Plaintiffs' survey of 110 districts revealed that in the 10 districts having taxable property of more than $100,000 per pupil, a tax rate of 31 cents per 100 dollars would yield $585 per student. In the four poorest districts surveyed, which had taxable property of less than $10,000 per pupil, a tax rate of 70 cents per 100 dollars would yield only $60 per pupil. So too, the study of the seven districts in the San Antonio area showed that the taxable property per student in the Edgewood District amounted to $5,429, whereas the taxable property per student in Alamo Heights amounted to $45,095. Taxes as a percent of market value were highest in Edgewood and lowest in Alamo Heights; but the yield from

Edgewood was "a meager twenty-one dollars per pupil from the local ad valorem taxes, while the lower rate of Alamo Heights provided $307 per pupil." (A. 261-62).

The court further found that the "State financial assistance [does not] serve to equalize these great disparities." When all state and local funds are accounted for, the Edgewood district had $231 per pupil in 1967-68 whereas Alamo Heights had $543 per pupil. Thus, "any mild equalizing effects that state aid may have do not benefit the poorest districts" (A. 262). "For poor school districts educational financing in Texas is . . . a tax more spend less system" (A. 262).

In measuring the Texas school financing methods against the Equal Protection Clause, the district court concluded that Texas allocates educational funds according to wealth,[14] and "lines drawn on the basis of wealth or property, like those of race are disfavored" (A. 263, quoting *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668 (1966)). Furthermore, in view of the "grave significance of education to the individual and to our society" (citing *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954)), the court concluded that Texas must demonstrate a compelling justification for its method of school finance (A. 264).

The State argued that its financing system was justified by the need to grant authority to local districts and local parents to determine how much would be spent on schooling their children. But the court found that the Texas financing plan does not promote this interest (A. 266-67). The State has "in truth and in fact, limited

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[14] The court also noted that "In this type of case 'the variations in wealth are state created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the state itself has defined and commissioned.'" (A.259-60, quoting *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870, 876 (D. Minn. 1971)).

the choice of financing by guaranteeing that 'some districts will spend low (with high taxes) while others will spend high (with low taxes).'" (A. 266). Accordingly, the court concluded that there was neither a compelling justification nor a rational basis for the State's wealth classification (*Id.*).[15]

The court enjoined defendants from giving force and effect to the current financing system, but stayed its mandate for two years in order to provide defendants and the Legislature with the opportunity to restructure the school financing plan (A. 272-73).

SUMMARY OF ARGUMENT

In establishing a system of free public schools, the Texas Constitution states that "a general diffusion of knowledge" is "essential to the preservation of the liberties and rights of the people." Art. VII § 1. The question presented by this case is whether, notwithstanding the importance of educational opportunity to the citizen and to democratic society, Texas may limit the educational opportunities of some groups of children because they live in school districts such as Edgewood where property values are low. The lower court held that Texas could not.

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[15] The court found defendants' reliance on *McInnis* v. *Shapiro*, 394 U.S. 322 (1969) and *Burruss* v. *Wilkerson*, 397 U.S. 44 (1970) was misplaced. Those cases challenged the failure of state financing plans to distribute funds according to the pupils' needs and the lower courts denied relief for want of a judicially manageable standard. Here, on the other hand, the lower court was called upon to determine whether "the quality of education . . . may be a function of wealth, other than the wealth of the state as a whole." (A.265-66). In short, there was no need for the court in *Rodriguez* to identify the nature and extent of the educational needs of children. The court was required to decide only whether the state could make the wealth of the school district a basis for allocating funds that would be used to educate the children in the district.

1. The decisions of this Court, particularly *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), establish that participation in the political process cannot be conditioned on wealth. Those decisions govern the case at bar. The right to education is at the foundation of our political and economic system. Education is essential not only to economic and social success, but to intelligent and effective participation in the political system. From the standpoint of both society and the individual, educational opportunity is an interest that includes, and transcends, the interests which society and the individual have in securing to the individual the right to vote. Through education and voting the State affords the individual the means for effecting orderly political and social change, and these means, as *Harper* and the Texas Constitution declare, are essential to the preservation of the individual's rights and liberties. Beyond that, the "general diffusion of knowledge" is necessary if our democratic society is to endure, for this society is predicated on the assumption that the guarantees of free speech, press and association will enhance the quality of government and that the people have the capacity to direct the operation of that government. Accordingly, the detriment to society and to the individual is at least as great when the State limits educational opportunity on the basis of wealth as when it limits the opportunity to vote on the basis of wealth.

2. The wealth discrimination revealed in the record in this case cannot withstand the careful scrutiny that *Harper* requires when basic interests of the individual and society are at stake. The record shows that Texas has developed a financing plan which allocates among school districts widely varying amounts of funds for the education of the children in the districts. As a consequence of the State's financing plan, far less is spent for the education of the children of Edgewood, for example, than is spent for the education of children in

other districts. No educational reason is advanced for funding the Edgewood children's education at levels far below those of other districts. This disparity in funding results, not from differences in the educational needs of the Edgewood children, but from the fact that these children must attend school in a district where the tax base is extremely low. The plight of these children, moreover, is of the State's own making, for the State has taken as its own the duty to educate the children of Texas; it has decided to finance education on a district-by-district basis; it has defined the districts; and it has made real property rather than other tax resources the determinant of the districts' wealth for educational purposes. In short, the State has allocated school funds according to the wealth of the district, and in doing so has provided abundantly for the children in some districts and meagerly for the children in other districts, although recognizing all the time that the educational needs of the children in the poor districts are no less than the needs of the children in the other districts (A. 54). This inexplicable wealth discrimination is as capricious and detrimental as the wealth discrimination struck down in *Harper*.

3. Texas would pass off the great inequalities in educational funding with the argument, made for the first time on appeal, that money really does not have an effect upon the quality of education that a child receives. This argument not only defies common sense and the judgments of parents, educators, school administrators, and taxpayers in Texas who in the past decade more than doubled the per pupil expenditures on a statewide basis, but also ignores a substantial body of research demonstrating a positive relationship between educational funding and learning, whether the latter is measured solely in terms of cognitive achievement or in terms of other qualities such as creativity and socialization.

4. Texas also attempts to justify the great inequalities in educational funding with the argument that its plan preserves "local control" over the schools. Its plan, however, is ill-fitted to this objective, because the meager resources made available by state law for education of children in relatively poor districts effectively preclude those districts from educational choices made available to wealthier districts. Thus, for the poor districts local control is largely a fiction. Moreover, there are less drastic means available to Texas for securing local control. Other financing plans have been drawn which secure local control without making the child's educational opportunities turn on the wealth of the district.

5. Appellants and others also suggest that the holding of the lower court would necessarily invalidate funding plans for other state and municipal services because these services, in many instances, are financed on a city-by-city basis from revenues derived through the local property tax. Those fears are wholly unfounded, however, for the central role that education must play in our democratic constitutional system is not shared by other local services.

ARGUMENT

I. PUBLIC EDUCATION, LIKE VOTING, MAY NOT BE LIMITED ON THE BASIS OF WEALTH UNDER THE EQUAL PROTECTION CLAUSE.

Amici urge the Court to hold, as the lower court did, that in providing public education the State may not discriminate on the basis of wealth. As we show in this brief, the holding below follows inevitably from this Court's holding in *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) and its progeny. There the interest at bar was voting; here the interest is education. However, the attributes that led the Court to hold that voting may not be restricted on the basis of wealth also inhere in public education. Voting and public education are the

basic institutions of the state for achieving orderly change. Both are integral parts of the political process; both are essential to the functioning of our democratic society and both are preservative of the citizen's other basic civil and political rights. Thus, under *Harper* and its progeny, education, like voting, may not be limited or denied on the basis of wealth.

A. Harper Holds that the Opportunity to Participate in the Political Process Cannot be Conditioned on Wealth.

In *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Court passed upon the constitutionality of Virginia's poll tax. By Virginia law the tax could amount to no more than $1.50 per capita, per year, and was levied, as a condition for voting upon residents of the State who were 21 years of age and over. The Court observed that while there is a constitutional right to vote in federal elections (Art. 1, § 2), the Constitution does not expressly mention the right to vote in state elections. But, the Court ruled, "we conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." 383 U.S. at 666.

The Court observed that the franchise is "preservative of other basic civil and political rights." *Id.* at 667. Accordingly, limitations on the franchise " 'must be carefully and meticulously scrutinized' " (*Id.*), and the wealth limitation in that case could not withstand such scrutiny. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant. . . . For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right is too precious, too fundamental to be so burdened or conditioned." *Id.* at 668, 670.

Since *Harper*, this Court has continued to scrutinize closely, and to bar, any wealth or property classification that limits the right to vote, *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Cipriano* v. *Houma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970) or the opportunity to run for office or vote for the candidate of one's choice, *Bullock* v. *Carter*, 405 U.S. 134 (1972).[16] The careful scrutiny that this Court gives to limitations on voting springs from the fact that the franchise lies "at the foundation of our representative society." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969). It is a right or opportunity generally afforded to all adult residents. It is a method by which a democratic society confers political power on its citizens. Together with the fundamental freedoms of speech and association, the franchise permits the individual to work his will with the government.[17]

The just and fair application of all laws, to be sure, is an important interest to be served by the Equal Protection Clause, but equality in the political process necessarily is a transcendent value. That is so because "in view of the Constitution, in the eye of the law, there is [to be] in this country no superior, dominant ruling class of citizens." *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Equal protection in the political process is central to the concept of a "'government of laws and not men.'" *Harper*, *supra*, 383

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[16] The Court does not give the same close scrutiny to laws that limit social and economic benefits on the basis of wealth or property. *James* v. *Valtierra*, 402 U.S. 137 (1971) (housing); *Dandridge* v. *Williams*, 397 U.S. 471 (1970) (welfare benefits); *Lindsey* v. *Normet*, 405 U.S. 56 (1972) (housing). None of these cases, however, involve issues relating to a limitation on the individual's opportunity to participate in the political process.

[17] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

U.S. at 667, quoting *Reynolds* v. *Sims*, *supra*, 377 U.S. at 568. "The remedial channels of the democratic process [must] remain open and unobstructed." *Minersville District* v. *Gobitis*, 310 U.S. 586, 599 (1940). There is no place in the political process for a mechanism that "tends to deny some voters the opportunity to vote for a candidate of their choosing; [while] at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Bullock* v. *Carter*, *supra*, 405 U.S. at 144. When a State, through the political process, "distributes influence" among its citizens, it is called upon to "distribute the influence without regard to wealth." *Id.* at 148.

Accordingly, the law looks with special disfavor on classifications based on wealth when they burden or impair the citizen's participation in the political process. *Harper*, *supra*, 383 U.S. at 668.

B. The Ruling in Harper Governs the Case at Bar.

1. *Public Education, Like Voting, Is an Indispensable Part of the Democratic Process.* We submit that restrictions on educational opportunity must be given the same close scrutiny that is given to restrictions on the franchise. As we show below, education, like voting, is essential to the citizen's meaningful participation in the political process and thus public education is vital to the maintenance of our democratic society and the political processes which sustain it. Moreover, the right to education is every bit as precious to the citizen as the franchise, for without education the right to vote is debased, and in countless other ways participation in our political and economic life is retarded.

Through the ages men have recognized that effective government is dependent upon education of the youth. Aristotle observed that "No one will doubt that the legislator should direct his attention above all to the educa-

tion of youth; for the neglect of education does harm to the constitution [of the city state] . . . ." Aristotle, *Politics, Book VIII.*

Our own constitutional and political processes have become distinctively dependent upon the existence of an educated people. Few nations have reposed so much confidence and responsibility in their citizens. The Bill of Rights, particularly the guarantees of life, liberty, property, speech and association, reflects a strong confidence in and reliance upon the ability of the individual to accommodate personal freedom with needs of an orderly society. *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, JJ. concurring). And the continuing extension of the franchise to new groups of our population, including the youth, demonstrates our belief that the people are capable of directing the political process.

Two years before the Constitution was adopted, the Confederate Congress included in Article III of the Northwest Ordinance this command:

> "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 U.S.C. p. XL-XLI.

The Founding Fathers repeatedly stressed the role of education in the development and maintenance of a democratic form of government. George Washington urged:

> "Promote then as an object of primary importance, Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." Farewell Address, *The Writings of George Washington* (Bicentennial Edition), Vol. 35, p. 230.

Jefferson wrote that the "most important bill" in the Virginia Code was the one providing for "diffusion of

knowledge among the people. No other sure foundation can be devised for the preservation of freedom, happiness." *The Papers of Thomas Jefferson*, Princeton University Press (1954), vol. 10, p. 244 (Letter to George Wythe). Jefferson wrote to Washington that "our liberty can never be safe but in the hands of the people themselves" but the people should have "a certain degree of instruction." "This it is the business of the state to effect, and on a general plan." *Id.*, vol. 9, p. 151 (Letter to George Washington). And John Adams held that "The instruction of the people, in every kind of knowledge that can be of use to them in the practice . . . of their political and civil duties, as members of society and freemen, ought to be the care of the public, and all who have any share in the conduct of its affairs, in a manner that never yet has been practiced in any age or nation . . . ." *The Works of John Adams* (1851), vol. 6, p. 168.

The fundamental value that the Founding Fathers placed on education is now reflected in the laws and constitutions of every State in the Union. The constitutions of every State not only establish the traditional, tripartite branches of government—the executive, legislative and judicial branches of government—but also, with one exception,[18] provide for the establishment of public schools. (See Appendix A.) Beyond that every State, with one exception,[19] compels all mentally and physically able chil-

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[18] After *Brown* v. *Board of Education*, 347 U.S. 483 (1954), South Carolina repealed its constitutional provision for the establishment of public schools. However, South Carolina's Constitution does provide for a "State Superintendent of Education," and a "State Board of Education," and it empowers the General Assembly to appoint "all other necessary school officers." (Art. XI, §§ 1-3).

[19] After *Brown* v. *Board of Education, supra*, Mississippi repealed its compulsory attendance laws. Other states following this course of action have since re-enacted their compulsory attendance laws. South Carolina Code, § 21-757; Virginia Code, § 22-275.1.

dren within the State to attend school for at least eight years.[20] The state constitutions command the legislatures to "provide for the maintenance and support of a thorough and efficient system of public schools,"[21] in recognition that education "is an indispensable governmental function." *Malone* v. *Hayden*, 329 Pa. 223-24, 197 Atl. 344, 352 (1938). The constitutional command "ranks" education "as an element necessary for the sustenance and preservation of our modern state." *Id.* See, *e.g.*, *City of Louisville* v. *Commonwealth*, 134 Ky. 488, 492-93, 129 S.W. 411 (1909); *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 68 So. 116, 119 (1915). Moreover, many of the state constitutions preface this command with the declaration that the general diffusion of knowledge and learning "is essential to the preservation of a free government,"[22] or, as in the case of Texas, that the general diffusion of knowledge is "essential to the preservation of the liberties and rights of the people."[23]

This Court, too, has recognized the vital connection between education and government. "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance

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[20] Two states, Arizona and Washington, require only eight years of education. All other states, save Mississippi, require nine years or more. See the compulsory education laws cited in Appendix B. For a study of compulsory attendance laws, see A. Steinhilber and C. Sokolowski, *State Law on Compulsory Attendance* (1965).

[21] This formulation is from the Pennsylvania Constitution, Art. III, § 14. It also appears, with slight variation, in many others. See Appendix A.

[22] Constitution of Indiana, Art. VIII, § 1. Similar or identical declarations appear in the constitutions of Arkansas, Idaho, Michigan, Minnesota, New Hampshire, North Carolina, North Dakota, South Dakota, and Tennessee. (See Appendix A.)

[23] Texas Constitution, Art. VII, § 1. Similar or identical declarations appear in the constitutions of Maine, Massachusetts, and Missouri. (See Appendix A.)

of education to our democratic society." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).[24] The public school is the "most powerful agency for promoting cohesion among a heterogeneous democratic people . . . ." *Illinois ex rel McCollum* v. *Board of Education*, 333 U.S. 203, 216 (1948) (Frankfurter J., concurring). "Americans regard the public schools as a most vital civic institution for the preservation of the democratic system of government." *Abbington School Dist.* v. *Schempp*, 374 U.S. 203, 230 (1963) (Brennan J., concurring). See also *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923).[25]

In our system "competition in ideas and governmental policies is at the core of our electoral process and of First Amendment freedoms," *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1969). And public education is the institution which the state has established for preparing individuals from all backgrounds for this competition. The state's classroom is the "marketplace of ideas." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Education provides the "know-how" that is necessary for the citizen to make his vote and his voice count in the political process. Indeed, studies show that educational attainment is the most significant determinant of

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[24] "In 1970 the United States spent $54 billion for public education or 5½ percent of its Gross National Product." Texas Research League, *Interim Report: Public School Finance Problems in Texas*, p. 1 (1972), derived from U.S. Dept. of Commerce Office of Business Economics, *National Income Accounts*.

[25] The President's Commission on School Finance, *Schools, People, and Money: The Need for Educational Reform*, p. 11, observed that "Literally, we cannot survive as a nation or as individuals without . . . [education]." "It is a fact that in a democratic society, public understanding of public issues is necessary for public support. Schools generally include in their courses of instruction a wide variety of subjects related to the history, structure and principles of American government at all levels. In so doing, schools provide students with a background of knowledge which is deemed an absolute necessity for responsible citizenship." *Id.* at 13-14.

political consciousness and participation.[26] With more schooling comes a greater understanding of the impact of government on the individual. With more schooling comes a greater awareness of political issues, a greater likelihood of participation in a political organization, and a more positive attitude "about the ability of people to govern themselves in a democratic fashion."[27] With more schooling comes a greater likelihood that the individual will cast a ballot. See *Gaston County* v. *United States*, 395 U.S. 285, 289 (1969).[28] The 1968 presidential elections, for example, showed a close and direct relationship between the citizen's educational attainment and his participation in the electoral process as the following table demonstrates.[29]

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[26] Urban Coalition, *Schools and Inequality*, Hearings Before the Senate Select Committee on Equal Educational Opportunity, 92d. Cong., 1st. Sess., 7068 (1971) (hereinafter "*Hearings*"), citing Almond, et al., *The Civic Culture*, pp. 380-81 (1963).

[27] *Id.*

[28] Prior to the Voting Rights Act of 1965, nineteen states conditioned the right to vote on literacy. *Voting Rights Legislation*, Senate Rept. 162, Pt. 3, 89th Cong,. 1st Sess., p. 42 (1965).

[29] Levin, *The Costs to the Nation of Inadequate Education*, Committee Print of the Senate Select Committee on Equal Educational Opportunity, 92d. Cong., 2d Sess. (1972), p. 47.

Educational attainment in the following chart is measured in terms of the number of years that voters and nonvoters have attended school. In this connection, it should be noted that the quality of education offered in a school district may materially affect the length of time that the student will attend school. Those children who graduate from inferior schools are materially handicapped in their quest for admission to college and, if admitted, in their struggle to succeed in college. Even before this stage in the child's life, inferior educational opportunities take their toll. As the Court recognized in *Gaston County* v. *United States*, 395 U.S. 285, 296 (1969), inferior schools offer children "little inducement to enter or remain in school."

REPORTED VOTER PARTICPIATION IN 1968 PRESIDENTIAL ELECTION [30]

	Proportion Voting			
	Whites		Blacks	
Years of Schooling	Males	Females	Males	Females
0 to 4	45.4	32.0	43.2	34.7
5 to 7	60.5	46.1	54.9	53.5
8	68.4	59.8	59.7	53.3
9 to 11	67.5	62.7	61.7	59.4
12	76.3	75.6	74.8	69.5
13 to 15	80.7	82.5	79.7	79.4
16	85.2	84.2	85.8	83.7
17 or more	86.4	88.3	88.4	----------

The short of the matter is that "virtually all studies on the subject have found a strong positive relation between educational attainment and political participation." [31]

The importance of public education to the individual is not confined to making more meaningful the right to vote and the guarantees of political speech and association. Through public education the state offers to the individual the means for changing his station in life. To the poor and oppressed, public education is the state's offer of a "ticket out." It is the "great equalizer of the conditions of men." Horace Mann, *Twelfth Annual Re-*

[30] U.S. Department of Commerce, Bureau of the Census, "Years of School Completed—Reported Voter Participation in 1968 and 1964 for Persons 25 Years Old and Over, by Race and Sex, for the United States: November 1968," Current Population Reports, series P 20, No. 192, table 11.

[31] *Hearings*, p. 7069. See also Levin, *The Costs To The Nation of Inadequate Education*, *supra*, pp. 46-47.

port to the Massachusetts State Board of Education, (1848), Commager, *Documents in American History*, 318 (1958 ed.). It "is a major determinant of an individual's chances for economic and social success in our competitive society." *Serrano* v. *Priest*, *supra*, 487 P.2d at 1255-56.[32]

In sum, education, like voting, is "crucial to participation in, and the functioning of, a democracy." *Serrano* v. *Priest*, *supra*, 487 P.2d at 1258. It is one of those "remedial channels of the democratic process [which must] remain open and unobstructed" for all citizens. *Minersville District* v. *Gobitis*, 310 U.S. 586, 599 (1940).[33]

2. *Wealth Is an Impermissible Basis for Distributing Educational Benefits.* The decisions in *Harper*, *Kramer*, *Cipriano* and *Bullock* make clear that the opportunity to participate in the political process cannot be withheld, diluted or conditioned according to wealth or property. The degree of discrimination on the basis of wealth is irrelevant. Such discrimination is flatly impermissible because "wealth or fee paying has . . . no relation to voting qualifications." *Harper*, *supra*, 383 U.S. at 670. So too, the use of wealth of a school district to determine the extent of the educational opportunity or experi-

[32] In *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), this Court identified education as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." See also, *Wisconsin* v. *Yoder*, —— U.S. ——, 32 L.Ed. 2d. 15 (1972).

[33] This Court has suggested that education is a fundamental interest. As we read *Wisconsin* v. *Yoder*, *supra*, the Court acknowledged that universal education ranked with "other fundamental rights and interests." The Court said, "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on *other fundamental rights and interests* specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children . . . ." —— U.S. ——, 32 L. Ed. 2d. 15, 24 (emphasis supplied).

ences that will be offered to a child is impermissible. The school district's wealth or lack of wealth, as we show below, has no relationship to any educational purpose.

The record makes clear, and appellants recognize (App. Br. 11), that there are wide variations in the tax bases of the school districts of Texas. Under the present system of school financing, these wide variations in the tax bases result in wide variations in the funds available to each district for the education of the children within the district. In principal measure these varations in available funds have been caused by the State of Texas. For, as appellants concede, "the duty to provide education is a function of the state"; the State has established a plan for financing education on a district-by-district basis; the State has defined the districts; the State has decided that real property rather than other tax resources will determine the wealth of the district for educational purposes; and the State has decided that the tax return from real property within the district may not leave the district (A. 53-54).

Pursuant to the State's plan, the amount of funds derived from the local property tax is, of course, a function of two factors: (1) the value of taxable property within the district and (2) the rate of the tax levied by the inhabitants of the district. But the basic disparities in local revenues among school districts are generally attributable to the first factor—the value of taxable property in the district. As the record shows, the poor districts are taxing themselves at rates higher than the wealthier districts (A. 205). Their failure to obtain revenues approximating the state average is not due to a lack of will, but to a lack of valuable property within the district. Thus, it is clear, as the district court found, that the State has created a plan which yields widespread variations in the per pupil expenditures of the various districts and that the State has made educational oppor-

tunity "a function of the local property tax base" of the district (A. 259-60 n. 1, 261).

While the State has made educational opportunities of children turn in significant measure on the wealth of their district (A.261), no educational purpose is served by this distribution of educational funds. Indeed, the State concedes that the children in poor districts such as Edgewood have no less need for expenditures than the children in other districts of San Antonio; that the costs for basic facilities and services in San Antonio are no less in Edgewood than in the other districts serving the city; and that the lines delimiting Edgewood do not have special educational significance, but serve only as lines establishing a unit for the administrative convenience of the State (A.53-54, 166). There is simply no basis in the record or in common sense for an assertion that the educational needs of the child or of the children in the district are linked in any way to the property values of their school district.

To limit the educational opportunities of some children on the basis of the school district's wealth is to limit the rights of these children on the basis of a capricious factor of the State's own making. Such a limitation is precisely what *Harper*, *Bullock* and other decisions have prohibited.

Appellants, however, contend that *Harper* and *Bullock* must be read very narrowly. In their view these cases prohibit only wealth classifications that are based on "individual ability to pay, not . . . the ability to pay of a collectivity such as a school district" (App. Br. 30-31). When wealth is the criterion by which the State grants or conditions participation in the political process, it makes no difference whether the criterion is the wealth of an individual or the wealth of a collectivity. Either way the wealth limitation is impermissible. The distinction that appellants suggest between wealth of the individual and

wealth of the collectivity would mean, for example, that under the Fourteenth Amendment, Virginia would be permitted to dilute or deny the right of residents in Prince Edward County to vote because the county is not as wealthy as other counties or is not making an equal contribution to the State's revenues. But *Harper, supra*, 383 U.S. 667-68, and *Reynolds* v. *Sims, supra*, 377 U.S. at 568, clearly reject such a result: "A citizen, a qualified voter, is no more nor less so because he lives in the city or on the farm. . . . The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." [34]

In sum, the wealth discrimination in the case at bar is at least equal in magnitude and effect to the wealth discrimination that was struck down in *Harper*.[35] Such a discrimination cannot be countenanced in a democratic society, for education, like voting, preserves our basic political and civil rights, provides the means for orderly change, and makes the guarantees of free speech, press and association more meaningful and effective. In the terms of *Harper*, "to introduce wealth . . . as a measure of" educational opportunity is "to introduce a capricious or irrelevant factor." *Supra*, 383 U.S. at 668.

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[34] See *Gordon* v. *Lance*, 403 U.S. 1, 4, where the Court said "the defect found in those cases [*Cipriano* v. *Houma*, 395 U.S. 701 (1969) and *Gray* v. *Sanders*, 372 U.S. 368 (1963)] lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election . . . ." See also *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 656-658 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962); *Cf. James* v. *Almond*, 170 F. Supp. 331, 339 (E.D. Va. 1959).

[35] See *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969) where the Court observed that a state may take steps to limit its expenditures for education, "but a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools."

In our view, *Harper* is dispositive of the case at bar, but because appellants attempt to justify their finance plan on the basis of educational research and the need for local control—two subjects that are particularly within the ken of amici—we turn to these subjects.

II. THERE IS NO PERMISSIBLE JUSTIFICATION FOR TEXAS' SYSTEM OF UNEQUAL EDUCATIONAL FUNDING.

In justification of the grossly unequal educational expenditures per pupil among various school districts in Texas, the State essentially makes two points. (1) It may not matter that there are wide ranges in pupil expenditures from district to district because educational research fails to demonstrate with certainty that there is a significant correlation between the amount of funds expended and the achievement of the children. (2) The ranges in expenditure are justified by an overriding consideration—the desirability of delegating control to the local school districts. Neither of these contentions is meritorious.

A. The Relationship Between Expenditures And Quality of Education is Well Recognized.

Texas, for the first time in this litigation,[36] seeks to justify the great disparities in per pupil expenditures with the casual observation that money does not matter. Appellants concede that "It is reasonable to suppose that there is some minimum sum of dollars beneath which a sound education cannot be had." But beyond that, ap-

[36] In the court below Texas did not contend that there was no demonstrable relationship between financial expenditures for education and student cognitive achievement. In its own proposed findings, Texas urged upon the court nothing more than to find that "the quality of education that a school child receives . . . cannot be determined *solely* on the amount of money spent per student." (A.73, Defendants' Proposed Findings of Fact. Emphasis supplied.)

pellants say that two scholars (Coleman and Jencks) "could not find evidence" of a relationship between expenditures and cognitive achievement, and the President's Commission on School Finance observed " 'the relationship between cost and quality in education is exceedingly complex and difficult to document. . . .' " (App. Br. 17-18, quoting the President's Commission on School Finance, *Schools, People and Money*, p. x (1972)).[37] Essentially, appellants are saying that the State is entitled to use a method of school finance that provides abundant resources for some children and meager resources for other children until such time as the children in the poor districts demonstrate that what the State is doing to them hurts (App. Br. 25).

Contrary to appellants' suggestion, there is, in fact substantial and respectable educational research demonstrating a statistically significant correlation between school funding and student achievement. For example, Guthrie and Levin's survey of cost/quality studies finds that:

> "The strongest findings by far are those which relate to the number and quality of the professional staff, particularly teachers. Fourteen of the studies we reviewed found teacher characteristics, such as verbal ability, amount of experience, salary level, amount and type of academic preparation, degree level and employment status (tenured or non-tenured) to be significantly associated with one or more measures of pupil performance." [38]

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[37] In support of their position, appellants also quote Roger Freeman, (who is an economist), the Circuit Court of Ingham County Michigan, a legal scholar and two officers of the Urban Institute (A.17-19).

[38] Quoted in *Report of the Commissioner's Ad Hoc Group on School Finance*, Department of Health, Education and Welfare, Hearings before the Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess., p. 8388 (1971).

Similarly, the Urban Coalition reviewed seventeen studies "which deal with the effectiveness of school service components." The Urban Coalition reaffirmed the findings of Guthrie and Levin and noted the "substantial degree of consistency in the studies' findings."[39] The Urban Coalition concluded:

> "In summary, we are impressed with the amount and consistency of evidence supporting the effectiveness of school services influencing the academic performance of pupils. In time, we would wish for more precise information about which school service components are most effective and in what mix or proportion they can be made more effective. ~~Nevertheless, on the basis of information obtained service components are most effective.~~ Nevertheless, on the basis of information obtained in the studies we have reviewed, there can be little doubt that schools 'can have an effect that is independent of the child's social environment.' In other words, schools do make a difference."[40]

In addition, the Staff of the Advisory Commission on Intergovernmental Relations (ACIR), recently reviewed cost/quality studies, including those of Coleman and Jencks and those relied upon by the research team of the President's Commission on School Finance.[41] The ACIR Staff concluded that "none of the studies, including those not reported here, has found a complete absence of significant relations between school inputs and out-

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[39] Urban Coalition, *Schools and Inequality*, Hearings Before the Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess., pp. 7031-32 (1971). The Urban Coalition's review of each study is found at pages 6995 through 7037.

[40] *Id.* at p. 7033.

[41] Staff of the Advisory Commission on Intergovernmental Relations, *School Spending and Pupil Achievement: A Working Paper* (May 30, 1972). This survey has not been formally submitted to the Advisory Commission for its publication approval.

puts." [42] As to the ten studies specifically reviewed in the Staff's working paper (which include Coleman and Jencks), the ACIR Staff concluded that "although the investigators all use different formulations of the concept, each study discussed here that tests the significance of individual teacher variables finds some teacher-related factor to have a significant impact on achievement." [43]

Finally, the Staff lays bare a critical problem related to virtually all of the cost/quality studies that have undergone so much evaluation and reevaluation. "All of the studies discussed here [including Coleman and Jencks] use the attainment of cognitive skills (measured by standard achievement tests) as the primary test of school effectiveness. But there are many non-cognitive qualities which may be equally or more important—socialization, independence, maturity, creativity. We know almost nothing about how schools affect these pupil traits." [44]

Educational research with respect to these traits, however, is far more advanced than the Staff indicates. For example, the Institute of Administrative Research, Teachers College, Columbia University, has evaluated the non-cognitive aspects of classroom learning in almost 20,000 classrooms. This survey reveals, *inter alia*, a direct and significant relationship between costs in terms of pupils

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[42] *Id.* at 1.

[43] *Id.* at 2. The Staff also points out that "out of sixteen similar studies surveyed by the Rand Corporation for the President's Commission on School Finance, only two (Kiesling [1969] and Smith) found no teacher variables to be important. The remainder found some teacher variable to have significant effect on learning—particularly experience (Thomas, Hanushek [1968], Katzman, Burkhead, Kiesling [1970], Levin and Michelson), average salary (Cohn, Raymond, and Averch), starting salary (Thomas), and verbal ability (Hanushek [1968], Bowles, and Hanushek [1970])."

[44] *Id.* at 1.

per teacher and the quality of the classroom experience in terms of non-cognitive factors.[45]

The short of the matter is that, contrary to appellants' suggestion (App. Br. 18), the positive relationship between dollars and quality education is a consistently recurring relationship of statistical significance in many studies.

Moreover, the positive relationship between dollars and quality education is a uniform predicate for the judgments made by public officials, school administrators and parents who send their children to the schools. The State of Texas, for example, acknowledges in its brief that between 1960 and 1970, it increased its expenditures for education "from $750 million to $2.1 billion, while the number of students increased only 37%, so that expenditures per student doubled from $416 to $855." (App. Br. 9; see also Appellants' Jurisdictional Statement, p. 8).[46]

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[45] The Institute's study is based on four "indicators of quality"—individualization, interpersonal regard, group activity, and creativity. Trained observers attend the classroom and evaluate the classroom activity, using a standardized instrument having 51 items. The results of surveying almost 20,000 classrooms show that with "only two small exceptions to an otherwise perfect linear relationship, smaller-class sizes exhibit significantly higher scores than large classes." M. Olson, "Identifying Quality in School Classrooms: Some Problems and Some Answers," *Know How* (published by the Associated Public School Systems) pp. 2-3, 4 (January, 1971). The results of this survey are set forth in tabluar form in Appendix C, *infra*.

[46] While the State has found it sufficiently important to double—on a statewide basis—the amount spent per pupil, the State has only recently raised the per pupil expenditure in Edgewood up to the $416 mark of 1960, a mark which the State has found to be insufficient for the education of its children. In 1967-68 Edgewood was receiving $248 per pupil from state and local revenues (A.219). In 1970-71 Edgewood's combined state and local revenues per student amounted to $418, whereas the statewide average per district was $704. Texas Research League, An Interim Report: *Public School Finance Problems in Texas*, p. 14 (June 1972).

The President's Commission on School Finance, *supra*, p. x, points out that irrespective of the vagaries of educational research, "what is clear is that when parents, with the means to do so, choose their children's schools, the ones they select, whether public or private, usually cost more to operate than the ones they reject."

The heart of the matter is that the funding level is important because it is a major determinant of the options available. The level of funding determines not only the type of physical plant and the salary level, degrees and experience of teachers, but also whether the school district can implement new programs for teaching reading and mathematics. It determines whether the schools will have such costly programs as vocational guidance, laboratory science, foreign languages, adequate libraries, and educational television; the number of professionals that will be employed as librarians, guidance counselors, and "visiting teachers" (truant officers in other days); and whether there will be special programs for the handicapped children, the unusually bright children, and the slow or wayward children.

In denying the importance of such programs and in claiming that there is no denial of equal educational opportunity for the children in poor districts, Texas once again collides head on with the decisions of this Court. The deprivation that children in the poor districts of Texas experience today [47] is essentially the same type of educational deprivation that this Court struck down in *Sweatt* v. *Painter*, 339 U.S. 629, 633-34 (1950). There Texas established a black law school and insisted that there was substantial equality between the black law school and University of Texas Law School, which at the time served only whites. This Court, however, held that the black students were being denied equal protection. "In terms of number of faculty, variety of courses and

[47] See pp. 8-9, & n. 13, *supra*.

opportunity for specialization, size of the student body, scope of the library, availability of law review and, similar activities, the Unversity of Texas is superior." *Id.* at 633. Moreover, it is superior in "reputation of faculty, experience of administration, position and influence of alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close." *Id.* at 634. So too, in *Gaston County* v. *United States*, 395 U.S. 285 (1969), the Court found that black citizens had been denied an equal educational opportunity in a segregated school system where, *inter alia*, the black teachers' salaries were lower than the white teachers' salaries, where the number of state certified teachers in the black system was substantially lower than in the white system, and where the "per-pupil valuation of Negro school property" ranged from "20% to about 40% of that of the white schools." On this showing, "it was certainly proper to infer that the County's inferior Negro schools provide many of its Negro residents with subliterate education, and gave many others little inducement to enter or remain in school." *Id.* at 293, 296.[48]

Clearly, the unequal expenditures for pupils in poor districts cannot be justified by pointing out that educational research has not unanimously nailed down how much of a difference various levels of funding make in terms of the child's cognitive achievement. The pivotal facts are that educational funds are "not being collected equitably or spent according the needs of the children." And it is this money that "builds schools, keeps them

[48] See also, *Keyes* v. *School District No. 1, Denver*, 313 F. Supp. 61, 82-83 (D. Col. 1970), *aff'd in part*, 445 F.2d 990, 1003-04 (10th Cir. 1971), *pending on cert.* in No. 71-507; *Hobson* v. *Hansen*, 327 F. Supp. 844, 854-55 (D.D.C. 1971); *Hargrave* v. *Kirk*, 313 F. Supp. 944, 947 (M.D. Fla. 1970) *vacated sub nom, Askew* v. *Hargrave*, 401 U.S. 476 (1971).

running, pays their teachers, and in crucial, if not clearly defined ways, is essential if children are to learn." President's Commision on School Finance, *supra*, p. xi.

B. There is No Logical Relationship Between Local Control of Schools and the Texas System of Financing.

The State's principal asserted justification for using a financing plan that makes educational expenditures for children turn in large measure upon the wealth of the school district is that this plan affords the community "local control" over the schools. (App. Br. 35).

At the outset, it should be made clear that the decision below does not in any way affect the degree of control which local school districts retain over how to spend the money they receive. Decisions with respect to curriculum, teachers' salaries, and other educational matters, to the extent they are within the control of local school districts, may, consistently with the lower court's decision, remain under their control.

Assuming that local control over the amount of money to be spent on education is a legitimate objective of the state, the present school financing plan in Texas is ill fitted to achieve that objective. The Texas plan does not assure such local control over schools in the poor districts. For these districts such control is largely a fiction because "so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide." *Serrano* v. *Priest*, *supra*, 487 P.2d at 1260. The resources available to such a district are not determined by local option, but instead by state law.

Without debating the merits of local control over the amount of money to be spent on education, it is sufficient to point out that the decision below can be affirmed without necessarily invalidating other financing plans under which this type of local control is preserved. Commentators have proposed various financing methods which are designed to assure that an equal unit of tax effort (tax rate) among school districts will produce an equal number of dollars per pupil among such districts. Thus, for example, a tax of ten mills in each district would produce $600 per pupil in each district.[49] Such plans would permit school districts to decide individually how much of a tax effort they should make in support of their schools.[50]

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[49] In Appendix D we describe one of these plans, "district power equalization." Appellants recognize that "district power equalization" would preserve local control (App. Br. 43), but reject this plan because, in their view, it would inhibit the freedom of poor districts. "Districts with relatively low property values would be under great pressure to tax themselves at a high rate in order to receive the maximum state aid. Communities that wish to emphasize services other than education, and that have property values lower than the state average, would be inhibited from doing so, since tax for education would produce a grant from the state while a tax for a park or library would not." (App. Br. 45). In our view, appellants' argument against power equalization misapprehends the facts. Power equalization rewards those who make the greater tax effort, and it is the poor districts who are currently making the greater tax effort (A.202, 205). The poor districts are taxing themselves at higher rates than the rich districts (*id.*). If the poor districts were to continue their present tax rates under power equalization, they would receive more school revenues than they are currently receiving. On the other hand, if the poor districts desired to maintain their present levels of educational funding, under power equalization they could reduce their tax rate, thus freeing tax resources which could be used for the parks and libraries that appellants want them to have.

[50] Amici advert to these plans not for the purpose of endorsing them or any other particular financing scheme, but only to show that invalidation of the present Texas plan would not necessarily affect the ability of Texas to preserve a measure of control by local school districts over the amount of educational funding in the district.

To summarize, if it is local control that Texas means to secure through its financing plan, it has chosen a plan that is "ill-fitted to that goal" and "other means to protect those valid interests are available." *Bullock* v. *Carter, supra*, 405 U.S. at 145-46. *Carrington* v. *Rash, supra*, 380 U.S. at 95. The wealth classification inhering in the State's school finance plan is not "necessary to achieve the articulated state goal" of local control. *Kramer* v. *Union School District, supra*, 395 U.S. at 632. Accordingly, the State's local control argument is no justification for limiting educational opportunity on the basis of wealth. *Id.*, *Bullock* v. *Carter, supra*, 405 U.S. at 145-46. See also, *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).[51]

III. THE DECISION BELOW DOES NOT REQUIRE REVISION OF PLANS THAT FUND OTHER STATE AND MUNICIPAL SERVICES.

Appellants and various amici supporting appellants[52] suggest that the decision below should not be affirmed because that would necessarily require the States to change their current, district-by-district, method of financing other important municipal and state services (App. Br., 29-30).

These dark warnings are unfounded. Our point is not simply that public education, like fire protection, police protection, welfare payments, and a host of other municipal services, is designed to meet important needs of citizens. Rather the point is that the attributes which

[51] Thus, it is unnecessary for purposes of this case for this Court to resolve the question whether local control over the amount of educational funding would constitute a compelling justification for inequalities in educational offerings to children based on the wealth of the school district in which they happen to live.

[52] See, *e.g.*, Brief Amicus Curiae: Richard M. Clowes, et al., of Los Angeles County, pp. 3-4, 18, n. 11, 54-55.

bring public education under the ruling of *Harper* and other decisions of this Court are not shared by other municipal and state services.

As we have shown above (pp. 16-26, *supra*) education, like voting is essential to our form of political organization. Public education preserves and makes meaningful the rights of speech, association and voting. Public education offers to each citizen the means for political and social change. In brief, public education is a critical part of the political processes of this society, and this quality sets education apart from the other services provided by state and municipal governments.

CONCLUSION

For the foregoing reasons the judgment of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX A

STATE CONSTITUTIONAL PROVISIONS ESTABLISHING PUBLIC SCHOOLS

Alabama—Art. XIV, Amendment CXI, § 256

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe.

Alaska—Art. VII § 1

The legislature shall by general law establish and maintain a system of public schools open to all children of the state and may provide for other public educational institutions.

Arizona—Art. XI § 1

The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and unique public school system. . . .

Arkansas—Art. XIV § 1

Intelligence and virtue being the safeguards of liberty and bulwark of a free and good government, the state shall ever maintain a general, suitable and efficient system of free schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

California—Art. IX § 5

The legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

Colorado—Art. IX § 2

The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state between the ages of six and twenty-one years, may be educated gratuitously.

Connecticut—Art. VIII § 1

There shall always be free public elementary and secondary schools in the state. The General Assembly shall implement this principle by appropriate legislation.

Delaware—Art. 10 § 1

The general assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.

Florida—Art. IX § 1

Adequate provision shall be made by law for a uniform system of free public schools, and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Georgia—Art. VIII § 1

The provision of an adequate education for the citizens shall be a primary obligation of the state of Georgia, the expense of which shall be provided for by taxation.

Hawaii—Art. IX § 1

The state shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor.

Idaho—Art. IX § 1

The stability of a Republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools.

Illinois—Art. X § 1

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

Indiana—Art. VIII § 1

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government: it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of Common Schools wherein tuition shall be without charge, and equally open to all.

Iowa—Art. IX Pt. 1 § 12

The Board of Education shall provide for the education of all the youths of the state, through a system of Common Schools and such schools shall be organized and kept in each school district at least three months in each year.

Kansas—Art. VI § 1

The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.

Kentucky—§ 183

The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.

Louisiana—Art. XII § 1

The legislature shall provide for the education of the school children of the state. The public school system

shall include all the public schools and all institutions of learning operated by state agencies.

Maine—Art. VIII § 1

A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the state. . . .

Maryland—Art. VIII § 1

The General Assembly, at its First Session after the adoption of this Constitution, shall by law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.

Massachusetts—§ 91 (Pt. 2, ch. 5, § 2)

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of people it shall be the duty of the legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns. . .

Michigan—Art. VIII §§ 1 & 2

Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.

Minnesota—Art. VIII § 1

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools.

Mississippi—Art. VIII § 201

The legislature may, in its discretion, provide for the maintenance and establishment of free public schools for all children between the ages of six (6) and twenty-one (21) years, by taxation or otherwise, and with such grades as the Legislature may prescribe.

Missouri—Art. IX § 1(a)

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

Montana—Art. XI § 1

It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free common schools.

Nebraska—Art. VII § 6

The legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of five and twenty-one years.

Nevada—Art. 11 § 2

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year. . . .

New Hampshire—Part II, Art. 83

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . . .

New Jersey—Art. VIII § 4 ¶ 1.

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

New Mexico—Art. XII § 1

A uniform system of free public schools sufficient for the education of, and open to, all children of school age in the state shall be established and maintained.

New York—Art. XI § 1

The legislature shall provide for the maintenance and support of free common schools, wherein all the children of this state may be educated.

North Carolina—Art. IX §§ 1 & 2

Sec. 1. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and libraries and the means of education shall forever be encouraged.

Sec. 2. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . .

North Dakota—Art. VII §§ 147 & 148

Sc. 147. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.

Sec. 148. The legislative assembly shall provide for a uniform system of free public schools throughout the state . . . .

Ohio—Art. VI § 3

Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds . . . .

Oklahoma—Art. XIII § 1

The legislature shall establish and maintain a system of free public schools wherein all the children of the state may be educated.

Oregon—Art. VIII § 3

The legislative assembly shall provide by law for the establishment of a uniform and general system of common schools.

Pennslyvania—Art. III § 14

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

Rhode Island—Art. XII § 1

The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education.

South Carolina—Art. XI. §§ 1, 2, & 3

Sec. 1. The supervision of public instruction shall be in a State Superintendent of Education . . . .

Sec. 2. There shall be a State Board of Education composed of one member from each of the judicial circuits of the state . . . .

Sec. 3. The General Assembly shall make provision for the election or appointment of all other necessary school officers, and shall define their qualifications, powers, duties, compensation and terms of office.

South Dakota—Art. VIII § 1

The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.

Tennessee—Art. XI § 12

Knowledge, learning, and virtue, being essential to the preservation of republic institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government, to cherish literature and science. And the fund called common school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by Legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be divested to any other use than the support and encouragement of common schools.

Texas—Art. VII § 1

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Utah—Art. X § 1

The legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State, and be free from sectarian control.

Vermont—Chapt. 2, § 64

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youths.

Virginia—Art. VIII § 1

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Washington—Art. IX § 2

The legislature shall provide for a general and uniform system of public schools.

West Virginia—Art. XII § 1

The legislature shall provide, by general law, for a thorough and efficient system of free schools.

Wisconsin—Art. X § 3

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years . . . .

Wyoming—Art. VII § 1

The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.

APPENDIX B

STATE COMPULSORY ATTENDANCE LAWS

Alabama

Code of Alabama, Title 52, § 297.

Alaska

Statutes of Alaska, § 14.30.010.

Arizona

Arizona Revised Statutes, § 15-321.

Arkansas

Statutes of Arkansas, § 80-1502.

California

California Code, § 12101.

Colorado

Colorado Revised Statutes, § 123-20-5.

Connecticut

Connecticut General Statutes, § 10-184.

Delaware

Delaware Code Annotated, Title 14, § 2702.

Florida

Statutes of Florida, § 232.01.

Georgia

Georgia Code, Title 32, § 2104.

Hawaii

Hawaii Revised Statutes, Title 18, § 298-9.

Idaho

Idaho Code, § 33-202.

Illinois

Statutes of Illinois, Ch. 122, § 26-1.

Indiana

Statutes of Indiana, § 28-5310.

Iowa

Iowa Code, § 299.1.

Kansas

Statutes of Kansas, § 72-1111.

Kentucky

Kentucky Revised Statutes, § 159.010.

Louisiana

Louisiana Revised Statutes, § 17:221.

Maine

Maine Revised Statutes, Title 20, § 911.

Maryland

Code of Maryland, § 77-231.

Massachusetts

Laws of Massachusetts, Ch. 76, § 1.

Michigan

Statutes of Michigan, § 15.3731.

Minnesota

Statutes of Minnesota, § 120.10.

Missouri

Statutes of Missouri, § 167.031.

Montana

Revised Codes of Montana, § 75-6303.

Nebraska

Nebraska Revised Statutes, § 79-201.

Nevada

Nevada Revised Statutes, Ch. 392.040.

New Hampshire

New Hampshire Revised Statutes, Ch. 193.1.

New Jersey

Statutes of New Jersey, § 18A:38-25.

New Mexico

Statutes of New Mexico, Ch. 77, § 10-2.

New York

Laws of New York, § 3205 (1) (a).

North Carolina

General Statutes of North Carolina, § 115-166.

North Dakota

North Dakota Century Code, Title 15, § 34.1-01.

Ohio

Revised Code of Ohio, § 3321.01 & 3321.03.

Oklahoma

Statutes of Oklahoma, Title 70, § 10-10.

Oregon

Oregon Revised Statutes, Ch. 339.010.

Pennsylvania

Statutes of Pennsylvania, Title 24, § 13-1326 & 1327.

Rhode Island

General Laws of Rhode Island, § 16-19-1.

South Carolina

Code of Laws of South Carolina, Title 21, § 21-757.

South Dakota

South Dakota Compiled Laws, § 13-27-1.

Tennessee

Tennessee Code, § 49-1708.

Texas

Texas Education Code, § 21.032.

Utah

Utah Code, Title 53, § 24-1.

Vermont

Statutes of Vermont, Title 16, § 1121.

Virginia

Code of Virginia, § 22-275.1.

Washington

Revised Code of Washington, § 28A.27.010.

West Virginia

West Virginia Code, § 18-8-1.

Wisconsin

Statutes of Wisconsin, § 40.77.

Wyoming

Statutes of Wyoming, § 21.1-48.

APPENDIX C

THE RELATIONSHIP BETWEEN CLASS SIZE AND NONCOGNITIVE LEARNING [1]

Elementary and Secondary Observations
Scored by Size of Class

Class Size	Elementary		Secondary	
	Number of Classrooms	Mean Score	Number of Classrooms	Mean Score
Under 5	155	10.61	77	8.31
5-10	218	8.84	505	8.45
11-15	310	8.34	1248	6.25
16-20	1395	7.26	2032	4.77
21-25	3736	6.45	2427	4.25
26-30	2898	4.73	1361	3.93
31-35	931	4.66	861	3.51
36-40	129	3.17	136	4.41
41-50	64	4.38	121	3.65
50+	94	2.22	260	3.22
Totals	9961		8567	
Means		5.96		4.83

[1] M. Olson, "Identifying Quality In Classrooms: Some Problems and Some Answers" *supra*, p. 4.

APPENDIX D

District Power Equalization [1]

"The objective of this method of sharing education costs among districts and the State is to guarantee to every district a given revenue yield for any tax rate a district chooses to impose on itself. In effect, if two districts, whatever their relative wealth and tax base, established school property taxes at the same rate, the State would guarantee—through payments—that per-pupil revenue for each district would be equal. Differences in district revenues, therefore, would depend not on their respective tax bases but on the rates at which they chose to tax themselves.

The following example demonstrates the way this method operates, assuming a State guaranteed a return of $25 per pupil in revenue for each mill levied and both districts chose the $750 per-pupil expenditure level which would require a 30 mill tax rate:

District	Tax Rate Selected (in mills)	Guaranteed Yield 1 Mill	Guaranteed Yield 30 Mills	Actual Yield 1 Mill	Actual Yield 30 Mills	Difference Between Actual Guar.
Rich	30	$25	$750	$35	$1050	+$300
Poor	30	$25	$750	$15	$ 450	—$300

[1] This description of district power equalization is taken from the President's Commission on School Finance, *Schools, People and Money: The Need for Educational Reform*, pp. 32-33 (1972).

As can be seen in this example, in the rich district, the tax rate of 30 mills produces the equivalent of $35 per pupil per mill for a per-pupil total of $1,050, which is $300 per pupil more than the guaranteed level based on $25 per mill. This surplus would accrue to the State. The poor district, taxing at the same rate of 30 mills, generates only $15 per pupil per mill or $450 per pupil. But since this district has taxed at the same rate as the wealthy district, under this plan, the State would supplement this district to the degree necessary to provide it with $25 per pupil per mill, or $300 per pupil. This method would equalize the yield in the different property evaluation of both districts."

I

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, et al., *Appellants*,

v.

DEMETRIO P. RODRIGUEZ, et al., *Appellees*.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF FOR

MAYOR AND CITY COUNCIL OF BALTIMORE, MARYLAND, A MUNICIPAL CORPORATION
CITY OF EAST ORANGE, NEW JERSEY
CITY OF JERSEY CITY, NEW JERSEY
CITY OF PATTERSON, NEW JERSEY
CITY OF PLAINFIELD, NEW JERSEY
AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
COUNCIL OF GREAT CITY SCHOOLS
INTERNATIONAL UNION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS
THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
THE NATIONAL URBAN COALITION
THE NATIONAL URBAN LEAGUE
THE CALIFORNIA MINORITY EDUCATION FINANCE REFORM PROJECT
THE LEAGUE OF WOMEN VOTERS OF TEXAS

AS AMICI CURIAE IN SUPPORT OF THE DECISION BELOW

The undersigned cities and urban interest organizations respectfully move for leave to file the accompanying brief in support of the decision below.*

Appellants' own brief and the *amicus* brief filed by certain suburban interests profess great concern for the effect of the decision below on the needs of the Nation's central city schools.** The undersigned agree that the decision in this case will affect millions of central city school children, as well as the cities in which they live, but they believe that interests as important as these should not be heard through surrogate spokesmen. This is particularly so where, as here, the surrogates have interests adverse to the cities. The Nation's cities and other urban interests can and do speak for themselves. And they must do so, for lack of funds for urban schools worsens the most urgent of the cities' other problems—poverty, crime, unemployment, racial tension, drug abuse, blighted neighborhoods and the flight to the suburbs of business and the white middle class.

This brief is filed to ensure that the Court has the benefit of the views of those directly affected, views decidedly contrary to those of appellants and the suburban surrogates.

The interests of Amici and their reasons for requesting leave to file are as follows:

1. The New Jersey cities of Jersey City, Patterson, Plainfield, and East Orange and the City of Baltimore, Maryland have been given the responsibility by their

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* The undersigned are authorized to state that counsel for appellants do not object to the filing of this brief, and that counsel for appellees consent to its filing.

** Brief for Appellants, pp. 41-42; Amicus Brief for Montgomery County, et al., pp. 83-95.

respective states to provide a public education for 300,000 pupils, yet have not been provided sufficient state funds for this purpose. As a result these children are compelled to attend schools with overcrowded classrooms, insufficient textbooks, and outdated physical facilities. The New Jersey cities are plaintiffs in the case of *Robinson* v. *Cahill,* L-18704-69 (Super. Ct., Hudson County, filed Feb. 17, 1970), in which they established that their children are being discriminated against by "gross inadequacies tied to fiscal inadequacies." The Mayor and City Council of Baltimore, Maryland are plaintiffs in the case of *Parker* v. *Mandel,* C.A. No. 71-1089-H (D.C.D. Md.) in which they have challenged the system used by the State of Maryland to finance public education on the ground that it makes the expenditure for each child's education a function of the wealth of the child's parents and neighbors as measured by the taxable wealth of the district in which the child resides.

2. The American Federation of Labor-Congress of Industrial Organizations is a federation of 122 national and international labor organizations having a total membership of approximately 12,500,000. The American labor movement has throughout its history sought maximum educational opportunity for all children. Unions played a major role in the establishment of public schools early in the 19th century and have continuously worked for the extension and improvement of public education. This case directly involves the quality of schooling and the integrity of the public education concept in theory and in practice throughout the United States.

3. The American Federation of Teachers is a voluntary association of education workers, which was

founded in 1916. It has more than 275,000 members throughout the United States. The purpose of the organization is to elevate the character and advance the interests of the occupation of teaching and to promote the cause of education in the United States. In furtherance of this purpose, AFT has long worked to ensure the adequate and equitable financing of public education throughout the nation. The AFT has worked for more than a half century to provide for equal educational opportunity for all American children. The present case deals with the application of the Equal Protection Clause to state allocation of resources to school children, an issue which has major implications for the financing of public education in every American community. For all these reasons the American Federation of Teachers joins in presenting this brief.

4. The Council of Great City Schools, incorporated in 1961 as a nonprofit organization, is comprised of twenty-three of the largest city school districts in the United States. Member cities include Atlanta, Baltimore, Boston, Buffalo, Chicago, Cleveland, Columbus, Dallas, Denver, Detroit, Houston, Los Angeles, Memphis, Minneapolis, Milwaukee, New York, Oakland, Philadelphia, Pittsburgh, Portland, St. Louis, San Diego, San Francisco and Washington, D.C. The activities of the Council are governed by a board of directors composed of one member of the Board of Education and the Superintendent of Schools from each participating city. The organization seeks to meet the comprehensive public school needs and to improve every facet of education in its member cities. A major concern of the Council has been the increasing disparities in financial support to education in urban centers as compared to suburban areas. It believes that such

discriminatory treatment of urban centers threatens to severely handicap vast numbers of city school children in the cities it represents.

5. The International Union, American Federation of State, County and Municipal Employees now represents more than a half million employees of state and local governments throughout the nation. It is deeply devoted to social reforms and improved social justice for the poor and particularly the urban minorities adversely affected by our prevailing system of funding our public education.

6. The International Union, United Automobile Workers and its nearly one and a half million industrial-worker members are vitally interested in quality public education for all our children. Having long supported the interests of the disadvantaged and the poor, UAW believes strongly in equality of educational opportunity and believes that a public education system built on inequality plainly violates fundamental constitutional guarantees.

7. The League of Women Voters is a non-partisan organization whose purpose is to encourage the informed and active participation of all citizens in government and politics. It is open to all women citizens 18 years or older, and has a membership of 157,000 in more than 1,275 Leagues in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands. From its inception in 1920 the League has worked at national, state and local levels on various governmental issues selected by the members for study, decision and action. In 1936 the Na-

tional League published a study entitled, *School Finance and School Districts,* which stated:

> "Long years of public discussion have brought agreement that free public education is essential to the well-being of a Democracy, that government has a right to tax the wealth of all to provide schools, that the state should offer all children equal educational opportunities, and that it can compel attendance for the period fixed by law."

Since 1964, concerted attention has been directed to the goal of equal opportunity. At every level of government, League members are working toward this goal, striving to achieve an American society in which all children will have equality of opportunity in access to education with the further benefits of economic settlement and greater participation in the mainstream of American life.

8. The National Urban Coalition, a private nonprofit corporation whose goal is the revitalization of America's cities, has established as one of its major objectives the extension of quality education, particularly to those students from disadvantaged backgrounds. Essential to this task is the removal of the gross inequities resulting from State education finance formulas which presently favor suburban areas at the expense of urban centers. The present case challenges the education financing system of the State of Texas. However, the factual pattern which the case presents and the important constitutional issues it raises extend to metropolitan centers across the nation. It is for this reason—because of the importance of this case to the future of American urban education—that the Nation-

al Urban Coalition requests leave of this Court to file the attached brief.

9. The National Urban League, as the oldest non-profit, non-partisan human rights organization in the nation, has waged a sixty-year campaign on the historical Four Horsemen Apocalypse that rides through the urban black ghettos of America—Poverty, Racism, Illiteracy and Neglect. In focussing on the amelioration of prevailing economic conditions in the black community, the National Urban League believes that the quality of a child's education should necessarily not depend on the neighborhood in which his parents reside, nor must the nature of that education remain subject to the capriciousness of local wealth.

10. The California Minority Education Finance Reform Project (CMEFRP) was founded for the purpose of examining the evidence regarding the effect of school finance proposals from the perspective of Blacks. The fundamental principle upon which the Project is based is the belief that the allocation of educational opportunity among children is more important than the allocation of money among districts.

While CMEFRP is premised on the assumption that money alone will not enhance educational opportunities, additional funding is critically required for programs which will do so. In pursuit of this objective, CMEFRP is doing legislative and legal research, analysis of school statistics, and organizing and training community people to set up local conferences to discuss and explain the issues.

11. The League of Women Voters of Texas is a nonpartisan voluntary organization, embracing Texas' 42

local chapters with an aggregate membership of approximately 4,200 Texas citizens. It is affiliated with the League of Women Voters of the United States. The general purpose of the League is to encourage informed and active participation of citizens in democratic governmental processes. To this end, the League has undertaken numerous studies on issues of public interest and has taken action as a result of these studies, including appearance as amicus curiae in judicial proceedings involving important public questions. Among the subjects to which the national, state and local Leagues have devoted extensive study is the impact of inequality in employment, education and housing in the United States, Texas and local municipalities. The League has concluded that lack of equal opportunity in education is of fundamental importance to the problems of poverty, employment, welfare, and the entire aspect of participation in our governmental processes among large segments of the population. This, in turn, underlies the overriding national problem of poverty among large segments of the population. In January, 1969, the League stated that its members believe that all levels of government share with other levels of government the responsibility to provide equality of opportunity in education, employment and housing for all persons in the United States. The Texas League is currently engaged in an intense study of alternative methods of financing public schools in Texas.

* * *

Because the present case, however it is decided, will have an important effect upon millions of central city school children and on the cities in which they live, and because affirmance of the decision below is essential if the states are to be freed to allocate scarce educational resources according to educational criteria rather than

arbitrarily in accord with local assessed property valuations, the undersigned request leave to file the accompanying brief.

Respectfully submitted,

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AS AMICI CURIAE IN SUPPORT OF THE DECISION BELOW

INTRODUCTORY STATEMENT

The undersigned cities and urban interest organizations file this brief out of conviction that statutory schemes whereby public school revenues derive largely from property taxes levied in arbitrarily drawn and unevenly endowed school districts, as in Texas, offend the Equal Protection Clause. Such schemes invidiously discriminate, *inter alia*, against central city school children. And without rational justification, they channel scarce education resources to affluent school districts that need them least, while starving hard-pressed urban school districts that bear heavier educational burdens.

Let there be no mistake about the harm done. As Dr. Mark R. Shedd, then superintendent of the Philadelphia schools, testified before the Senate Committee on Equal Education Opportunity last September, "The urban schools of this country are dying. They are dying from financial strangulation. . . ."[1] He did not exaggerate. On June 6, 1972, the Detroit Board of Education, facing a $50 million deficit on top of the previous year's $38 million deficit, adopted a "survival" budget requiring a 36% reduction in spending; this was to be achieved by slicing the school year to 117 days, far short of the 180 days mandated by Michigan law.[2] On August 2, 1972, the Mayor of Philadelphia announced that lack of funds might require that city to end the 1972-73 school year for its 374,000 children in March, three months early. These extraordinary developments are only symptomatic of a nationwide school financial crisis. Equally harsh announcements of early closings,

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[1] Equal Educational Opportunity—1971, Part 16A, Inequality in School Finance, Hearings before Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess., Sept. 21, 1971, p. 6603 [hereinafter cited as "Inequality Hearings"].

[2] Moving papers of Detroit Federation of Teachers, June 22, 1972, in *Bradley* v. *Milliken*, C.A. No. 35257, U.S.D.C. (E.D. Mich.).

teacher layoffs and other cutbacks have been made or can be expected in Boston, New York, Newark, Baltimore, Pittsburgh, Cleveland, Cincinnati, Dayton, Chicago, St. Louis, Portland, Los Angeles and many other cities.

San Antonio's plight may be less dramatic; but it is no less poignant. The 25,000 public school children, mostly Mexican-Americans from low-income families, who live within the governmentally drawn boundaries of the Edgewood Independent School District, the poor central city school district which spawned this litigation, have educational needs at least as great as those of children in other San Antonio area school districts. But Edgewood's poverty, measured by low assessed valuation per student, disables local authorities from providing their children with the same facilities, teachers, supporting personnel, library books, equipment, supplies and breadth of curriculum available in surrounding districts favored by the draftsmen of capricious school district boundaries with greater assessed valuation per student.[3] Why are similarly situated school children treated so differently? The answer is clear. The state has drawn school district boundaries so that poor Edgewood, despite a high tax rate, raises only $26 per child, while affluent Alamo Heights, a nearby suburban oasis, raises $333 per child with an equivalent tax rate. State "equalizing" contributions do not narrow the gap. In 1968-69, Edgewood received only $3 more per child ($225 to $222) than did its most affluent neighbor.[4]

Dr. Shedd's grim diagnosis of the general plight of city schools, and the record's blunt account of what

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[3] Affidavit of Dr. Jose Cardenas, App. 234–40.

[4] App. 219. Counsel has been advised that the statement in text is correct, and that the cited table inadvertently inverted the Edgewood and Alamo Heights figures in this one category—state aid.

actually happens when the level of school spending is made to turn largely upon an unevenly distributed property tax base, are not disputed even by those who seek to defend such arrangements. Indeed, they purport to find ground in the special needs of the Nation's central city schools and their disadvantaged school children for continuing to tolerate the Texas pattern. Consider, for example, the nearly 20 pages devoted to urban school needs in the amicus brief filed on behalf of suburban interests. Amicus Brief for Montgomery County et al., pp. 83–99. Like counsel for appellants,[5] these suburban spokesmen contend that because proscription of the statutory linkage between school funding and local wealth would not automatically "guarantee" more money for urban schools, and because a possible application of the decision below so as to require mathematically equal expenditures per student might even reduce the flow of school funds to some cities, arrangements like the one in Texas should be preserved no matter how egregious their disparities.[6]

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[5] Brief for Appellants, pp. 41–42.

[6] How to reconcile this professed concern for adequate urban school funding with the contention that money cannot be equated with "academic achievement" we leave to appellants. The fact is that their last-ditch fight to preserve the current maldistribution of state educational resources speaks louder than words and belies the contention that money is irrelevant. If money is totally unrelated to academic achievement, after all, why do suburban schools with the resources to do so spend so much more than their poorer urban and rural neighbors? We cannot believe the Court will be persuaded that billions of dollars for buildings, maintenance, libraries, books, supplies, gymnasiums and professional and supporting salaries are so unimportant that invidious discrimination in their distribution can be deemed constitutionally irrelevant—whether or not arithmetically related to "academic achievement." As to the relationship between resources and achievement, see *Gaston County* v. *United States*, 395 U.S. 285, 294–96 (1969), where both Congress (in the Voting Rights Act of 1965) and the Court forthrightly concluded that correcting resource imbalances would enable resource-starved schools to produce more equal educational achievement.

Central cities support this judicial challenge to the Texas statutory scheme because it irrationally allocates scarce educational resources chiefly on the basis of local wealth rather than according to legitimate educational considerations. Such schemes disserve the cities, which typically combine extraordinary educational needs with fewer available resources for education than the suburbs that surround them. Indeed, such schemes have helped to create today's urban school crisis, and now stand stubbornly in the way of any rational solution.

It is the considered judgment of the undersigned that affirmance of the decision below is an absolutely necessary and essential step if the Nation's urban schools are to be enabled to cope with their financial crisis.

ARGUMENT

I. STATUTORY SCHEMES LIKE THE ONE IN TEXAS INVIDIOUSLY DISCRIMINATE AGAINST CENTRAL CITY SCHOOL CHILDREN.

A. The Texas scheme precludes meeting the special and acute educational needs of the cities.

Most educational aid formulas are archaic vestiges of the first decades of the century, when some of the Nation's central cities were "wealthy" in the limited sense that they reported above average assessed valuation per student, and when state aid was designed to reduce disparities between "rich" central cities and outlying areas. These formulas remain in operation although the conditions for which they were designed no longer exist.[7]

First, shifts in population and economic activity have converted most central cities into "have-nots."

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[7] S. Sacks, City Schools/Suburban Schools, A History of Fiscal Conflict 1–2, 28–45 (1972).

Since 1950, central cities have grown increasingly poor and black, as middle-class whites (whose children have fewer educational problems), business and industry have fled to the suburbs. With them went a portion of the city's tax base. Left behind was the high-cost population of the racially concentrated and educationally disadvantaged. By 1966 the incidence of poverty was nearly twice as great in central cities as in suburbs.[8] By 1970, twenty-six of the seventy-two largest cities were more than one-quarter black; at the same time, sixty-seven of the seventy-two largest suburban rings were more than 90% white.[9] Detroit and Cleveland offer striking examples of these trends. Between 1950 and 1966, Detroit suffered a net loss of 20–30,000 families but gained 50–60,000 school children as blacks replaced less prolific whites; Cleveland lost 130,000 in net population, but experienced a public school enrollment increase of 50,000.[10] Indeed, blacks comprise a

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[8] A. Downs, Who Are the Urban Poor 14 (Committee for Economic Development 1968). 1970 figures show that in the seventy-two largest standard metropolitan areas central cities also have approximately 20% fewer high-income households than their suburbs. 1970 Survey of Buying Power, SALES MANAGEMENT (June 10, 1971).

[9] Data taken from Bureau of the Census, General Demographic Trends for Metropolitan Areas, 1960-1970, Table I (PHC-2 Series). See also Rept. of Nat. Advisory Comm. on Civil Disorders 242-243 (Bantam ed. 1968).

[10] Rept. of Nat. Advisory Comm. on Civil Disorders, 430–31. It should be noted that the combination of high city taxes and relatively poorly funded city schools not only fuels the white middle-class flight to the suburbs, but the "Balkanization" of school finance frees the suburbanite of any financial stake in city schools—and helps to motivate suburban resistance to integration involving the inferior city schools. This is a vicious circle which cannot be broken without reform of the way public schools are funded.

majority or near majority of public school students in seven of the ten largest American cities.[11]

As industry, business and affluence have shifted from central cities to suburbs, so have economic resources. Central cities are losing employment in manufacturing, wholesale and retail sectors at about 0.5 percent per year, while suburban area employment in these sectors is increasing at about 2.5 percent a year.[12] In similar fashion, the central city share of metropolitan retail sales declined from 63% in 1958 to 54% in 1963 to 46% in 1967.[13]

Second, the combined impact of these demographic and economic changes has seriously depressed the tax base of central cities. The value of suburban property for the nation as a whole has grown in recent years more than two and one-half times as fast as that of central cities.[14] Appendix A shows the dramatic growth within a recent five year period in suburban property values as compared to the central city in the nation's thirty-seven largest standard metropolitan statistical

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[11] *Ibid.*

[12] Bureau of the Census, Trends in Social and Economic Conditions in Metropolitan Areas, Current Population Rep., ser. P-23, No. 27, at 36 (Feb. 1969).

[13] Advisory Comm. on Intergovernmental Relations, Metropolitan Disparities—A Second Reading, table III (1970), derived from Bureau of the Census, Census of Business 1958, vol. II, Census of Business 1963, vol. II, and Census of Business 1968, vol. II.

[14] Regional variations were even greater. In the Northeast suburban property values climbed about three times as fast as those of central cities. In the Midwest the value of suburban property grew at more than six times the rate of its central cities. Staff of Senate Select Comm. on Equal Educational Opportunity, 92d Cong., 1st Sess., Federal Aid to Education: Who Benefits 17 (Comm. Print 1971) [hereinafter cited as "Federal Aid"].

areas. Baltimore is typical. As recently as 1950, the suburbs around Baltimore reported only 81% of the assessed per capita valuation of the central city. By 1960, the ratio had shifted to the suburbs' favor; they then had 110% of the city's per capita valuation—and much lower revenue needs. Property values in Milwaukee County follow the same pattern. Suburban property values per capita were 105% of those in the central city in 1935, 120% by 1940 and 138% by 1960. The most recent data show that the property value per capita of suburban Bexar County is more than twice as great as per capita values in San Antonio, its central city.[15] As the prestigious Advisory Committee on Intergovernmental Relations has put it, once "well-balanced" communities have been replaced by "lop-sided" metropolitan communities, characterized by poor, increasingly black core cities surrounded by affluent suburban areas.[16]

The cities, thus, have not only ended up with higher proportions of poor and minorities, and their harder to educate children, but also with less of a tax base to deal with them.

Third, consideration of three crucial variables—the cost of educational facilities and services, students' educational needs, and competing demands upon local tax revenues—shows that the Texas scheme for funding schools that ties the education of central city children to a weakening tax base, rather than benefiting city child as appellants and their supporters argue, signifi-

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[15] Dept. of HEW, Rep. of the Commissioner's Ad Hoc Group on School Finance appearing in General Appendixes to Hearings on Equal Educational Opportunity Before the Senate Select Comm. on Equal Educational Opportunity, 92d Cong. 1st Sess. pt. 16-D-3, at 8367–8370 (1971) [hereinafter Ad Hoc Group Report].

[16] Advisory Commission on Intergovernmental Relations, Urban American and the Federal System, 9 (1969).

cantly contributes to the growing crisis in urban education:

1. Educational facilities and services typically cost more in the cities.

Urban education facilities and services typically cost more. Urban land is more costly to acquire, urban schools are more costly to build and maintain, and urban faculties and staff more expensive to recruit and retain. This point is tellingly made by the United States Commissioner of Education's Ad Hoc Group on School Finance. The Group's 1969 report noted that in 1967 the City of Detroit, for example, paid more than $100,000 per acre for school sites, whereas surrounding suburban districts with access to undeveloped land paid only one-sixteenth as much, or $6,000 per acre.[17] A recent study made by the Urban Institute research staff also found that cities with over 25,000 people spend more for site acquisition (land) and buildings compared to suburbs and smaller cities.[18]

Central city school districts must compete for teachers with the suburban districts in their metropolitan area, but they must often assign new teachers to classrooms crowded with difficult to educate children located in an antiquated building in a depressed area. Thus it is not surprising to find that central cities have had to offer teacher salaries equal to or above those paid by wealthy suburban districts where working conditions may be perceived by teachers as less strenous

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[17] Ad Hoc Group Report at 8372.

[18] Levin & Muller, Cost Differentials in Public Schools, (Urban Institute, forthcoming). The study found, for example, that the city of Rochester spent $110,673 per acre of land between 1965 and 1970 for elementary schools, its suburbs only $2,066. New York City exclusive of land, spent $5,045 per pupil to build new secondary schools in 1970, compared to $3,074 for similar facilities in suburbs and $2,889 in small jurisdictions.

and anxiety producing. For example, the entry level salary for Detroit teachers for 1968-69 was $7500, nearly $600 more than the average in 35 surrounding suburban districts, and $300 above the closest suburban district.[19]

2. Special central city problems such as large concentrations of the educationally disadvantaged generate the need for relatively greater urban school funds.

Not only does the city school dollar buy less, it has vastly more to do. The educational needs of the cities have always been more complex and more expensive to meet than those of suburban and rural areas.

Central city schools have had to cope, for example, with large concentrations of non-English speaking children, children from poor and culturally deprived homes—frequently migrants or the offspring of migrants from the poorest and most educationally deprived areas of the country, and victims of racial discrimination and other physical, mental and social handicaps.[20] Numerous studies document the greater

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[19] Ad Hoc Group Report, at 8372. An Urban Institute study also found average teachers salaries in large cities in eight states to be higher than in fast growing suburbs in close proximity to these cities. Levin, Muller, Scanlon, and Cohen: Public School Finance: Present Disparities and Fiscal Alternatives 99 (The Urban Institute, 1972)

[20] Status & Impact of Educational Finance Programs, 4 National Educational Finance Project 50 (R. Johns, et. al., eds., 1971). Federal Aid, *supra*, n.14 at 19. The task of central city schools is even greater than it might appear from total population statistics because non-white children and poor children in large cities compose a far larger proportion of school enrollments than of the total population. For example, in 1965, 52% of the public school enrollment in Chicago was non-white, although non-whites composed but 28 percent of the total population.

And the schools in cities such as Baltimore, Detroit, Boston, Cincinnati and Philadelphia, in 1967, had more than twice their expected proportion of low income pupils. Baltimore, for example, had 27% of Maryland's pupil enrollment in 1967, but 51% of the state's Title I (ESEA) children. Federal Aid at 27.

frequency of low achievement and other disabilities among minority group and lower social class pupils.[21]

As a consequence the large cities enroll a disproportionate percentage of students in special programs. The six largest cities in New York State, for example, enroll 38% of the State's pupils yet must provide special programs for 63% of the State's handicapped, 62% of the pupils in the State from impoverished families, and 65% of the State's full-time vocational pupils.[22]

Even supporters of the present system must concede that such factors interfere with "academic achievement" and vastly enlarge the job of city schools, for the cost per pupil is much higher for handicapped children, for compensatory education for the culturally disadvantaged, for the education of non-English speaking pupils and for vocational education.[23] The New York City schools, to cite one example, presently serve 290,000 Spanish-surnamed students, 135,000 of them insufficiently skilled in English to benefit from regular classroom instruction. But bilingual education is expensive and there is money for

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[21] Among the many studies on the relation between race or social class and pupil performance, see especially J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, *Schools and Inequality* (1969); James S. Coleman et. al., *Equality of Educational Opportunity*, U.S. Commission on Civil Rights; *Racial Isolation in the Public Schools*, Vol. 1 (1967).

[22] Conference of Large City Boards of Education of New York State, Program 1971, at 5–6 (1970)

[23] Current practice places the cost of vocational-technical education and compensatory education at about 2 times the cost of a basic elementary school program and physically and emotionally handicapped programs at about 3 times a basic program. Nat'l. Educational Finance Project, Future Directions for School Financing 28 (1971)

bilingual classes for only 4000 of these children.[24] What suburban or rural jurisdiction has so difficult a problem—or one so patently amenable to solution if more money were available?

Finally, the school plant in most central cities is poorly located, aging and badly in need of replacement. In 1965, over 50% of all school buildings in Boston, Cleveland, Pittsburgh and St. Louis were over 45 years old, as were over 36% of all school buildings in the 15 largest cities. The suburban school plant, on the other hand, is largely of recent construction and well located. As a result, suburban districts are entering an era of low capital requirements, while the cities must soon replace a large part of their total plant—at today's and tomorrow's inflated costs.[25]

3. Central city school funds are limited because the tax dollar must meet other pressing municipal needs.

Defenders of the statutory dependence of school funding upon local wealth blandly suggest it is all a matter of "priorities", that if cities spend less on schools, it is because they have "chosen" to tax themselves less. Precisely the opposite is true. Both the record and the national figures demolish this contention, for the record shows that Edgewood would have to tax itself at more than eight times Alamo Heights' rate to generate equivalent revenues. (App. 218). Nationally, although the cities raise less for schools than do non-urban districts, they tax themselves 40% more heavily overall.[26] Moreover, the city dweller in 1970

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[24] Report of the New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education 1.62 (1972) [hereinafter the Fleischmann Report].

[25] Sacks, *supra*. n.7 at 52-53.

[26] Ad Hoc Group Report, at 8370

paid a substantially higher percentage of his income in local taxes—7.3%—than did his more affluent suburban neighbor—5.1%.[27]

The urban property tax base, already strained by higher educational costs and greater pupil needs, must support a much greater range of non-educational government services than suburban or rural jurisdictions. Expensive but unavoidable municipal services such as police, firefighting, health care, welfare, sewage, mass transit and sanitation compete for the education dollar. In general, central cities spend twice as much per capita as outlying areas for non-educational services.[28] Ironically, many of these dearly paid for municipal services benefit not only city taxpayers, but nontaxpaying suburbanites as well.

The disparity in demand for non-educational services between central city and suburbs—the so-called "municipal overburden"—has been increasing. In 1957, the 37 largest central city areas had 82 per cent higher per capita non-educational expenditures than their suburban rings. By 1970, this disparity had increased to 95 per cent.[29] The problem is most obvious in older Northeastern and Midwestern cities where the disparity averaged over 100 per cent by 1970.[30] Per capita non-

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[27] *J. S. Berke and J. J. Callahan, Serrano* v. *Priest:* Milestone or Millstone, 21 JOURNAL OF PUBLIC LAW 23, 48 (1972). See Appendix B hereto for Baltimore, Boston, Philadelphia, Cleveland, San Antonio and Portland examples.

[28] S. Sacks and J. Callahan, Central City-Suburban Fiscal Disparities in the 72 Largest Metropolitan Areas, 75 (Advisory Commission on Intergovernmental Relations study, based on data supplied by the U.S. Bureau of the Census, 1972) [hereafter cited as City-Suburban Disparities]; Appendix B hereto.

[29] City-Suburban Disparities, 59; Appendix B hereto.

[30] City-Suburban Disparities, 75.

educational expenditures in Denver, Colorado, for example, were more than three times greater than those in surrounding suburbs.[31]

Central cities as a result cannot devote as large a percentage of their total budget to education as suburbs do. On the average, education expenditures comprised 30-35 per cent of central city budgets between 1957 and 1970. During the same time span, education expenditures were generally about 55 per cent of suburban budgets.[32] Due in large measure to such municipal tax overburdens, central city per capita educational expenditures in 1970 were only 85 per cent of suburban levels.[33]

B. In practice, statutory schemes like the one in Texas have precipitated a crisis in central city school finance.

The fact is that many central city school systems have been driven to the brink of bankruptcy by these factors that are at work in every American city and make a mockery of rhetoric about "local control."

1. Philadelphia.

Dr. Shedd testified that the City of Philadelphia, in the face of the ever-growing educational needs of its 374,000 students, many of them severely disadvan-

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[31] Bureau of the Census, Local Government Finances in Selected Metropolitan Areas and Large Counties, 1969-70, Table 3 (1971).

[32] City-Suburban Disparities, 61. Cf. Final Rept. of the Task Force on Urban Education of the Dept. of HEW 43 (Praeger ed. 1970) [hereinafter Urban Education Rept.]. See Appendix B hereto.

[33] City-Suburban Disparities, 75.

taged,[34] was forced in the preceding year to eliminate 600 teaching positions, 800 support personnel, and sharply cut purchases of books, supplies and equipment. Financial pressures compelled an increase in class size, although his *educational* judgment was that a decrease was necessary. A badly needed school-building program had to be stopped despite the fact that 30 schools serving 30,000 children were unsafe, 400 classrooms were being rented from churches and other nonacademic sources, and four high schools were already on "dual" programs. Even with these draconian measures, the Superintendent anticipated that Philadelphia schools would have to close a month and a half early in 1972 because operating funds would then be exhausted. His prognosis for the future, with debt service alone accounting for $56 million and mounting, was even more bleak unless decisions like the one below have "nationwide repercussions."[34a] The March school closing threatened for 1973 bears him out.

2. Detroit.

The Detroit crisis is still more grave. Deficits have grown from $1¼ million in 1966-67 to $38 million last year and to a possible $88 million in the present school year. Halving maintenance on the city's aging school plant (buildings average between 40 and 50 years in age), stopping all painting and redecorating, cutting textbook purchases by 15%, and increasing class size hardly made a dent in the deficit. In April of 1972, 1548 teachers were laid off, effective in June. And in June over one-third of the coming school year was

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[34] Tests indicated that 40% of the city's elementary school population, or 56,000 children, were "functionally illiterate." Thirty percent of all secondary school students were "absent" on any given day—a too common pattern in the central cities. Inequality Hearings, at 6608–6608.

[34a] Id., at 6615.

cancelled. Yet Detroit has one of the highest combined tax rates in Michigan. Moreover, cuts in the state's "equalization" payments to Detroit deprived the city's schools of $91 million over the last ten years. Detroit's new austerity moves threaten continuation of other state and federal programs, which are fashioned to benefit principally those school districts affluent enough not to need them.

Detroit and Philadelphia are far from unique cases. President Nixon's Task Force on Urban Education found such conditions reflected to varying degrees in all of the large cities of the nation. Many it found are faced with: (1) deficits from the preceding years; (2) defeat of bond issues; (3) impossible alternatives of substandard programs or early closing dates; (4) continuing deterioration of facilities for which there is no money to maintain or rebuild; (5) inability to keep good teachers for lack of salary incentives; and (6) inability to hire urgently needed additional staff members.[35] The tragedy of this crisis is that the current plight of cities with respect to education is, in considerable measure, the consequence of state fiscal policies.

3. Why these crises

For insight into what this controversy is really about, it is instructive to compare Detroit with three of its affluent suburbs.[35a] Fully 65% of Detroit's public school population is black or other minority group. In Dearborn the equivalent percentage is 1.3%; in Bloomfield Hills, 1.1%; in Grosse Pointe, 0.3%.[36] On

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[35] Urban Education Rept. at 81.

[35a] The following comparative figures are from Myers, "From Auto City to School Bus City," City 33-39 (Summer 1972).

[36] In the Nation's 15 largest metropolitan areas, the nonwhite segment of the central cities' school population in 1965 ranged from 21% to 88%. Berke & Callahan, *supra* n.27, at 38 (1971).

seventh grade achievement tests, Dearborn students score in the 87th percentile nationally; in Bloomfield Hills, in the 98th percentile; in Grosse Pointe, in the 97th. Detroit's seventh graders score at the bottom, in the first percentile. Per student assessed valuation in 1968-69 in the three suburbs ranged from nearly $24,000 to over $42,000. In Detroit it actually fell from $20,000 in 1960 to $16,500 in 1968. The suburbs, with their easily educable middle and upper class children, spent from $965 to $1,056 per student. The City of Detroit was able to spend only $756 per student, even with federal aid.[37] This inverse relationship of need to resources existed despite the fact that the city taxed itself for education at double the statewide average rate, and its total tax rate was substantially higher than that of *any* suburban jurisdiction.

One can hardly imagine these crises occuring in the panglossian world painted by appellants and their suburban supporters where educational expenditures always increase, where each state's "flat grant" or "foundation program" is to be presumed sufficient to guarantee an "adequate education" for every child, and local school districts have "control" over their own destiny. Just as the fabled fox and stork are "free" to drink from the same milk container,[38] so too are urban and suburban school districts "free" to rely upon unevenly distributed local wealth to meet their

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[37] Here, too, the Detroit pattern is representative. One study of 12 large metropolitan areas showed that whereas 10 of the 12 central cities spent more per student in 1950, by 1965, 7 of the same 12 were outspent by their suburbs. Report of Nat'l Advisory Comm. of Civil Disorders *supra* n.9, at 434-45.

[38] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

educational and other needs.[39] The result is a tragic inversion of needs and resources.

4. The distribution of state aid under statutory schemes like the one in Texas aggravates the present plight of central cities.

The foregoing analysis demonstrates that any rational scheme would allocate more aid to cities than to suburban areas. But far from meeting the special needs of the cities, state aid systems actually discriminate against the cities. The fact is that most state aid systems still base school support on the educationally irrational measure of local property wealth and still function as if the fiscal positions of central cities were superior to suburban areas.

The invidious nature of the statutory linkage between school funding and local wealth is not substantially ameloriated by the various forms of "flat grants" and "equalization" formulae that exist in Texas and other states. If they have any one characteristic, it is that they do not equalize. Despite their operation, the grossest disparities continue to exist. Indeed, these devices frequently work to exacerbate disparities. Too often poor urban districts cannot meet all conditions of full entitlement to derive full benefit from these programs—which in fact widens the gap between "haves" and "have-nots."[40]

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[39] Except where, as in Florida, Virginia and other states, state law either imposes an absolute ceiling on local tax levies, or punishes "excess" local levies by making off-setting deletions from otherwise available state grants.

[40] A recent study in New York, for example, revealed that state aid plans "tend to reinforce the inequitable distribution of local resources rather than offset it." The study noted that aid to central cities averaged $100 less per student than for suburban students, that aid to the largest cities was in every case below the county average, and in 4 of the 9 cases was the lowest in the area. Revising School Finance in New York State, Aug. 1971, p. V-7.

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Because the statutory dependence of school funding on local wealth arbitrarily and irrationally fails to consider differences in school costs, in education needs, and in competing calls upon local tax resources, it has produced the grossest disparities in expenditure levels. Chief among its victims have been the central city schools and the millions of children they serve.[41] The inescapable fact is that central city school children increasingly go to school in firetraps, find their special needs unmet, and begin their "summer" vacations in early spring, while suburban school children live out the American dream. That is the nature of the problem. It is not to be obscured by cant about "local control," or by highly debatable contentions from affluent and high-spending suburban districts about whether "dollar input" is arithmetically translatable into "academic achievements." Thus, central city schools and the millions of children who attend them do have a major stake in the outcome of this case, for the present inequitable and irrational system of funding public schools denies them anything like equal treatment. The ruling of the court below which finds the present system unconstitutional, irrational and discriminatory holds out hope at long last for these children of a funding system rationally related to educational criteria.

II. THE DECISION BELOW SHOULD BE AFFIRMED.

The undersigned urge the Court to affirm the decision below. Public school funding has too long been straight-jacketed by the statutory dependence upon the

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[41] In 1962 the outlying areas surrounding 29 of the 37 largest cities received greater state educational aid per pupil than those cities. Sacks, *supra*, n.7 at 88.

local property tax. Neither in Texas nor in any other state has it been possible to allocate scarce educational resources on a rational basis. Instead, the availability of funds within each artificially drawn school district has largely remained a function of its local property tax base, discounted by other urgent calls upon those same resources. Districts drawn wealthy enough to generate adequate or surplus funds have been able to do so without regard to cost or need. Adjacent districts with the most compelling educational needs and far greater cost differentials, but without adequate tax resources available for schools, go without.

Judicial invalidation of this arbitrary and irrational scheme for financing public education is essential if the states are to be free at last to make educational criteria controlling in the funding of public schools.

A. Affirmance is constitutionally compelled.

The Court should affirm whether or not it concludes that education is a "fundamental" interest, or that the established doctrine of "wealth" as a "suspect" category applies. Should the Court accept the analysis of these issues adopted by the court below and by state and federal courts in California, Arizona, Florida, Minnesota, New Jersey and Wyoming,[42] affirmance should follow, for appellants make out no "compelling necessity" to justify the egregious disparities in educational expenditures which characterize the chal-

[42] *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (D Minn. 1971); *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla.), vacated, *Askew* v. *Hargrave*, 401 U.S. 476 (1971); *Hollins* v. *Shafstall*, No. C–253652 (Super.Ct. Maricopa Co. Ariz., Jan. 13, 1972); *Robinson* v. *Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972); *Sweetwater Co. Planning Comm.* v. *Hinkle*, 491 P.2d 1234 (Wyo. 1971).

lenged statutory scheme. But should the Court not accept such an analysis, we demonstrate below that it should nevertheless affirm on the ground that the classification here fails even the test of "rationality."

1. Appellants must demonstrate a "compelling necessity" for the present funding system, and they cannot.

The undersigned believe that education is a "fundamental interest," that the present system does improperly incorporate the "suspect" category of "wealth" as the basis for deciding on whose children billions of school dollars are spent each year, and that either of these considerations alone requires appellants to convince the Court that the egregious disparities in school funding shown here are "*necessary* to promote a *compelling* state interest." *Dunn* v. *Blumstein*, 405 U.S. 330, 335–37 (1972); *Bullock* v. *Carter*, 405 U.S. 134–144, 147 (1972); *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971).

a. *Education as a "fundamental interest."*

Education is a "fundamental interest" not only because of its extraordinary importance, but also because of the unique degree of state involvement in education and its intimate, "perservative" relationship to rights expressly rooted in the Constitution. Cf. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Nearly 50 million Americans participate in public education as students, professionals or other employees.[43] Nearly 90% of all American children are forced, by a combination of compulsory school attendance law and lack of viable alternative, to entrust their education to the public schools.[44] No other governmental en-

[43] Simon and Grant, Digest of Educational Statistics 2, 5 (HEW 1970).

[44] *Ibid.* at 2.

terprise has so firm or complete a grip on so many people. In no other field have the states so long and so deliberately assumed such complete, near monopoly responsibility and required the vast majority of their citizens to participate in a state-run enterprise. The states do not, for example, assume equivalent responsibility for their citizens' food and housing needs; they do not compel the vast majority of citizens to eat state food or live in public housing.

Even more significant, rights to free speech, press, association, and the other political and civil rights guaranteed by the Constitution are inextricably intertwined with the quality and quantity of public education. Daniel Webster put the case well when he said "On the diffusion of education among the people rest the preservation and perpetuation of our free institutions." [48] Both the Court and Congress have recognized this special relationship between education and voting rights. In *Gaston County* v. *United States*, 395 U.S. 285, 289 (1969), for example, this Court noted that

> "The legislative history of the Voting Rights Act of 1965 discloses that Congress was fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise. This close relationship was, indeed, one of the principal arguments made in support of the Act's test-suspension provisions."

It then proceeded to weigh disparities in educational opportunities afforded black and white children in Gaston County, including differences in teacher salaries and certification, and in "per-pupil valuation" of

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[48] Quoted in President Richard M. Nixon's American Education Week Proclamation, Proclamation 4144, July 26, 1972.

school property used to educate black and white children. 395 U.S., at 294. It concluded that such disparities had the effect of subjecting many children to a "subliterate education" with "little inducement to enter or remain in school," resulting in a disastrous impact upon their ability later to function as voters. The force of *Gaston's County's* reasoning is not dissipated by suspension of voter literacy tests. More recently, in *Wisconsin* v. *Yoder*, ____ U.S. ____, ____, 32 L.Ed. 15 (1972), this Court "accepted" the "propositions" that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence . . . [and] education prepares individuals to be self-reliant and self-sufficient participants in society." [46] One set of scholars has concluded,[47]

> "Among all of the significant determinants of political consciousness and political participation, schooling appears to predominate. Almond and Verba describe the overwhelming importance of education in determining political orientation and postulate several means by which education relates to political orientation. The more educated person tends to exhibit a greater awareness of government's impact on the individual than is the case for persons of less education. Moreover, the more

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[46] As long ago as 1925 this Court tacitly recognized that the right to an adequate education was a "fundamental" right reserved to the people under the Ninth Amendment, if not expressly granted by the Constitution. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Cf. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); Black, The Unfinished Business of the Warren Court, 45 Washington Law Review 1, 35–45 (1970).

[47] Guthrie, Kleindorfer, Levin & Stout, *supra* n.21, at 165-167.

educated the individual, the greater his awareness of political issues, the greater is the range of persons with whom he discusses politics, the more likely he is to be a member of a political organization, and the more positive are his attitudes about the ability of people to govern themselves in a democratic fashion.

Empirical evidence of the schools' effects on political attitudes is found in the extensive study of Hess and Torney. They examined the backgrounds and attitudes of approximately 10,000 elementary school students in grades two through eight selected from 16 middle class and 16 working class schools in eight cities. On the basis of their analysis, they conclude that, "... the school stands out as the central, salient, and dominant force in the political socialization of the young child."

Given this background, it is no surprise that virtually all studies on the subject have found a strong positive relation between educational attainment and political participation. Agger and Ostrom found education to be even more significant than income in predicting political participation. Education appears to be particularly important in explaining who is likely to cast a ballot. Moreover, the greater the individual's educational attainment, the more likely he is to become involved psychologically in politics. One of the best known authorities on the subject concludes:

"Perhaps the surest single predictor of political involvement is number of years of formal education." In short, the link between education on the one hand, and political participation and potential efficacy on the other has been well documented. Persons with higher educational attainment are more able and more likely to become involved in the political process and to influence the outcome of those issues that affect them. Persons with lower levels of education not only are not as

> knowledgeable concerning political issues, and thus not as likely to be aware of matters affecting themselves, but also are less well informed about the entire political process and thus not as capable of expressing their views even when they are aware of relevant issues. Clearly, lack of schooling or lack of good schooling restricts one's ability to exercise his political rights." (Footnotes omitted)

When the state teaches future voters to read, instructs them in civics and economics, and cultivates their interests and tastes, it is engaged in activity so closely related to essential constitutional rights that it may not practice invidious discrimination absent the most "compelling necessity." None is even suggested.

b. *"Wealth" as a "suspect" category.*

Equally fatal to the challenged statutory scheme is its endemic focus upon local wealth as a basis for allocating school dollars. It matters little that the "wealth" in issue is collective and not that of plaintiffs themselves, or that in a few districts—we are cited examples in Kansas [48]—there may be poor correlation between family income and assessed valuation per student. This Court laid such objections to rest in *Bullock* v. *Carter*, 405 U.S. at 144, where it invalidated onerous candidate filing fees on the basis of their impact upon a collective —"the less affluent segment of the community" without regard to the candidate's own economic status—and despite the fact that there were "doubtless some instances" where the "less affluent" were unaffected.

[48] Appellants' Brief, at p. 23.

What emerges from the record in this case is that Texas' scheme for funding public schools imposes "built-in headwinds" unrelated to any educational objective upon children who live in "poor" districts. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).

2. The challenged scheme for funding public schools fails even the less stringent test of rationality.

The Court need not reach the "fundamental interest" or "suspect category" issues, for the Texas "system" [49] of funding public schools fails even the most lenient test of equal protection—whether a legislative classification is rationally calculated to further legitimate objectives of the statutory scheme. *Reed* v. *Reed*, 404 U.S. 71 (1971). Appellants ask the Court to certify the Texas statutory scheme as "rational" on the articulated ground that it makes possible "local control." That simply isn't so, for this statutory scheme is as "extraordinarily ill-fitted to that goal" as was the Texas filing fee system held unconstitutional in *Bullock* v. *Carter*, 405 U.S. at 146.

To begin with, this litigation has nothing to do with how local districts expend their funds. Indeed, even with respect to funding, the decision below does not prohibit all techniques for achieving local control of revenue raising. And the fact is that the challenged scheme actually interferes with and makes impossible any genuine measures of local control; it arbitrarily confines haphazardly drawn and unequally endowed school districts largely to the revenues yielded by local

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[49] One hesitates to call what Texas does a "system," for the challenged pattern of funding bears little evidence of anything so rational as a "system." See, for example, the appellants' inability to answer appellees' interrogatory asking whether Edgewood's boundaries were "a product of historical accident rather than any logical plan of development." (App. 167).

property taxes and not required for other governmental functions. What "control" does Edgewood, Philadelphia or Detroit, for example, have over its school crisis?[50] Districts are "poor" because low assessed valuation in the artificial boundaries drawn by the state minimizes the yield of even the most burdensome tax rate, and because of competing calls upon limited tax revenues. Such districts have little "control" over the gap between their needs and resources. They must suffer their children to be deprived while adjacent but more "affluent" districts meet or exceed their own school needs with substantially less tax effort. As one Federal Reserve Bank economist concluded, "Local options are severely limited under the present systems that closely tie school spending to the community's property tax base."[51]

Rationality requires that Texas and its sister states allocate educational resources according to educational criteria rather than the accidental variation of local wealth or poverty.

B. The decision below opens the door to a sound educational policy.

There is no absolute assurance that affirmance of the decision below will be translated into additional funds for urban schools. Nor is there any guarantee that such a decision will not be misapplied by some to yield equal dollars per student on a statewide basis, ignoring cru-

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[50] Indeed, a significant portion of Detroit's current deficit arises from expenses incurred in implementing state-mandated reorganization programs that imposed $6 million in start-up costs. On the contrary, in the middle of the school year 1971-72, the state reduced its contribution to Detroit schools by $4 million, bringing the total below that of the previous year. Moving Papers, op. cit. *supra*, n.2.

[51] Weiss, Existing Disparities in Public School Finance 10 (1970). For a similar conclusion by the Advisory Commission on Indergovernmental Relations, see note 52 *infra*.

cial differences in costs and needs under the banner of a pseudo-equality of expenditure—despite the clear teachings of this Court that "the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways," *Reed* v. *Reed*, 404 U.S. at 75, and that "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). But it has never been an answer to a charge of unconstitutionality that the unlawful regime might be replaced by one equally invidious or by one of doubtful wisdom.

There is no necessity in this case for the Court to fashion any substitute scheme for allocating educational resources, or to choose among alternatives. *Bell* v. *Burson*, 402 U.S. 535 (1971). As the briefs in this case abundantly document, there are many permissible ways by which states may intelligently and rationally distribute their educational resources. Whether the choice is fully to assume the burden of raising and distributing school dollars to all of the states' school children, some form of "district power equalizing", or some other alternative, is a question, in the first instance, for the state legislatures.

The only issue before the Court is whether the scheme by which Texas allocates educational resources among its public school children deprives certain of them of equal protection.

C. The response to judicial decisions striking down statutory schemes like the one in Texas has been encouraging.

It is true that this Court must enforce the imperatives of the Constitution without regard to the popularity or lack thereof of its decisions. But the extraor-

dinary response to decisions like the one below suggest that the inequities endemic to the Texas pattern of financing public schools are widely felt, that there is broad recognition that such patterns do great damage, and that there is a genuine willingness to use the legislative freedom such decisions make possible.

Nearly everyone who has studied the problem in depth has concluded that the statutory dependence of school funding upon local wealth has been unfortunate, and that the alternatives posited offer greater hope. The conclusion of the New York State Commission on Quality, Cost and Financing of Elementary and Secondary Education is typical. This group, popularly called the Fleischmann Commission, voiced the consensus when it wrote that:

> "It is repugnant to the idea of equal educational opportunity that the quality of a child's education, insofar as that education is provided through public funds, is determined by accidents of birth, wealth, or geography; that a child who lives in a poor district is, by reason of that fact alone, entitled to lower public investment in his education than a child in a rich district. It is unconscionable that a poor man in a poor district must often pay local taxes at higher rates for the inferior education of his child than the man of means in a rich district pays for the superior education of his child. Yet, incredibly, that is the situation today in most of the 50 states, and that is the case in New York.
>
> "The New York State school system does not provide educational equality. In fact, its structure insures the continuance of basic inequality in educational revenue raising and expenditure."

The Commission recommends that reliance upon local property taxes be replaced by full state funding of education costs, utilizing a state property tax or other statewide taxes. Prestigious organizations like the Advisory Commission on Intergovernmental Relations have come to similar conclusions, and appear to support the changes presaged by decisions like the one below.[52] President Nixon for example, in his January 20, 1972 State of Union Message promised that later this year he would make his "final recommendations for relieving the burden of property taxes and providing both fair and adequate financing for our children's education." The President's Secretary of Health, Education & Welfare, Elliott Richardson, on April 17, 1972, said:

> "We recognize as inherently inequitable and unfair the situation which now exists under which the disparity of local property taxes for school financing results in such wide disparities between one school system and another."

United States Commissioner of Education Sidney Marland, Jr., has characterized the California Supreme Court's decision as a

> "very fundamental breakthrough in the concept of equity in state educational systems."

He was quoted in the New York Times for January 10, 1972 as saying that the

> "overwhelming reliance on property taxes so basically hinged to fiscal financing today is regressive, anachronistic, and resting on inequity. From

[52] ACIR, State Aid to Local Government, 14-16 (1969). The ACIR concluded that this "should leave ample room for local initiative and innovation in the field of public education," and indeed would free local school officials to concentrate on education. *Id.*, at 15.

> state to state the record shows that the present system of raising and allocating funds for the schools adds up to a rigged lottery and cheats students and taxpayers alike."

Even sociologist Daniel Moynihan, whose writings are much relied upon by appellants and their supporters, wrote in the New York Times on January 10, 1972 that

> "I would wish to repeat that the Texas school decision seems to me to be just, if only because it will strike most persons as adhering to a principle of fairness."

CONCLUSION

Decisions like the one below are not panaceas to all of the ills of public education. But they offer the hope that our problems can be dealt with intelligently and rationally. That hope was well expressed by Professors Berke and Kelly, who told the Senate Select Committee that what the courts have done is to

> "provide only an opportunity, not an answer, only a starting point for reform, not a solution to the unfairness and irrationality of the pattern of education in America."[53]

The undersigned are deeply concerned about urban education. They believe that substantial additional funds are needed for the schools of the central cities. They are convinced that any rational system for allocating educational resources will ultimately take into account differences in educational costs and burdens. They are prepared to take their case to the legislatures

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[53] Inequality Hearings, 6652.

once school funding is freed of the straightjacket imposed by the unwarranted dependence of school funding on local wealth.

Respectfully submitted,

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APPENDIX A

Growth of Property Values

Inside (CC) and Outside Central City (OCC) Areas 37 Largest Standard Metropolitan Statistical Areas 1961 & 1966

Area	% Values in CC		% Growth in Values 1961-1966	
	1961	1966	CC	OCC
Washington	43.0%	34.9%	30.2%	83.6%
Baltimore	47.9	40.6	4.3	40.3
Boston	23.1	16.7	2.3	52.8
Newark	20.8	17.6	109.0	157.9
Patterson-C.P.	na.	na.	na.	na.
Buffalo	44.6	42.1	.3	11.0
New York	79.8	78.3	22.1	48.5
Rochester	49.4	41.6	2.5	40.8
Philadelphia	58.4	48.4	8.8	62.6
Pittsburgh	30.2	27.9	2.2	14.5
Providence	33.7	29.7	-.2	20.2
Northeast	43.1	37.8	18.2	53.2
Chicago	49.4	44.5	4.5	26.8
Indianapolis	50.1	43.4	14.0	49.5
Detroit	48.9	37.2	-4.6	54.3
Minn.-St. Paul	59.6	49.1	1.8	56.0
Kansas City	55.0	52.8	13.8	24.1
Cincinnati	42.3	30.6	7.4	67.5
St. Louis	32.8	29.8	5.7	21.2
Cleveland	40.4	34.3	-5.1	23.5
Columbus	57.9	56.0	21.9	31.6
Dayton	na.	30.3	na.	na.
Milwaukee	51.6	46.5	9.7	34.9
Midwest	48.8	41.3	6.9	38.9

Area	% Values in CC		% Growth in Values 1961-1966	
	1961	1966	CC	OCC
Miami	na.	29.2	na.	na.
Tampa-St. Pete	na.	na.	na.	na.
Atlanta	43.5	33.7	24.7	88.4
Louisville	50.9	49.1	227.3	251.8
New Orleans	83.0	78.2	10.2	49.6
Dallas	na.	na.	na.	na.
Houston	na.	51.7	na.	na.
San Antonio	72.3	na.	na.	na.
South	62.4	48.4	87.4	129.9
Los Angeles-L.B.	40.1	41.6	44.4	39.4
San Bernardino	na.	na.	na.	na.
San Diego	54.5	54.3	26.2	27.3
San Francisco	39.6	33.3	19.6	57.4
Denver	55.7	49.9	11.2	40.8
Portland	53.0	40.2	-23.4	28.8
Seattle	55.5	46.7	21.2	72.4
West	49.7	44.3	16.5	44.4
Total	48.9	41.9	21.1	54.4

Source: U. S. Bureau of the Census. 1962 Census of Governments. *Taxable Property Values;* U.S. Bureau of the Census. 1967 Census of Governments. *Taxable Property Values.* Vol. II.

APPENDIX B

Selected Fiscal Characteristics Central City and Suburban Areas 1970

1. Per Capita Total Expenditures for Government Services

City	Central City	Outside Central City	C.C./O.C.C. Ratio *
Baltimore, Md.	$638	$349	183%
Boston, Mass.	531	365	146
Philadelphia, Pa.	495	325	152
Cleveland, Ohio	512	368	139
San Antonio, Texas	252	258	98
Portland, Ore.	486	328	148

2. Per Capita Non-educational Expenditures

City	Central City	Outside Central City	C.C./O.C.C. Ratio *
Baltimore, Md.	$416	$134	310%
Boston, Mass.	392	188	209
Philadelphia, Pa.	321	122	263
Cleveland, Ohio	302	173	172
San Antonio, Texas	129	60	202
Portland, Ore.	298	115	259

3. Education Expenditures as a Percent of Total Expenditures

City	Central City	Outside Central City	C.C./O.C.C. Ratio *
Baltimore, Md.	35%	62%	56%
Boston, Mass.	26	49	53
Philadelphia, Pa.	35	63	56
Cleveland, Ohio	41	53	78
San Antonio, Texas	49	77	64
Portland, Ore.	39	65	60

4. Taxes as a Percent of Income

City	Central City	Outside Central City	C.C./O.C.C. Ratio *
Baltimore, Md.	8.0%	5.1%	157%
Boston, Mass.	11.6	6.4	181
Philadelphia, Pa.	7.9	4.7	168
Cleveland, Ohio	9.6	5.2	184
San Antonio, Texas	4.0	2.4	166
Portland, Ore.	7.0	4.5	156

* Central City as percentage of Outside Central City.

Source: S. Sacks, and J. J. Callahan, Central City—Suburban Fiscal Disparities in the 72 Largest Metropolitan Areas, a report compiled from 1970 data of the U.S. Bureau of the Census, Local Government Finances in 72 Metropolitan Areas, prepared for the Advisory Commission on Intergovernmental Relations (1972).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1332

Supreme Court, U.S.
FILED
OCT 10 1972
MICHAEL RODAK, JR., CLERK

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,

Appellants,

—vs.—

DEMETRIO P. RODRIGUEZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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ARGUMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., a charitable, non-profit corporation, by its undersigned attorneys, respectfully prays that this Court grant leave pursuant to Rule 42 of the Supreme Court Rules, permitting it to file the appended Brief *Amicus Curiae* in support of affirmance in this cause. The interest of proposed *amicus* in this litigation is fully described *infra* at pp. 1-4 of the Brief; this cause involves matters of exceptional public importance of the sort which have traditionally marked those cases in which this Court has permitted the filing of briefs *amicus curiae.*

Consent to the filing of this Brief has been withheld by appellant State of Texas and thus this motion is submitted.

WHEREFORE, proposed *amicus* respectfully prays that this Court grant leave to file and accept the appended Brief *Amicus Curiae* in support of affirmance of the judgment below.

Respectfully submitted,

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IN THE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit membership corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race or color who are unable, on account of poverty, to employ and engage legal aid on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society, and that approval has been renewed. The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is independent of other organizations and supported by contributions of funds from the public.

A central purpose of the Fund is the legal eradication of policies and practices in our society that bear with discriminatory harshness upon Negroes and other minority group citizens, and upon the poor or deprived, who all too often are minority group citizens. Throughout its existence, the Fund has been particularly sensitive to the need to eliminate such discriminations in the educational field. Not only does the failure to provide adequately for the preparation of minority group children condemn them as adults to continue the cycle of poverty and discrimination, but the contrast between the programs made available to them and those afforded children of the dominant racial and ethnic groups affects young minds in a particularly stinging way to produce bitterness and strife.

In part for these reasons, the Fund has pioneered in the legal struggle to eliminate racial and ethnic segregation in the public schools. Its attorneys have been associated with virtually every major school desegregation case decided by this Court between *Brown* v. *Board of Education*, 347 U.S. 483 (1954) to *Wright* v. *Council of the City of Emporia*, 40 U.S.L.W. 4806 (U.S. June 22, 1972), and have likewise participated, with local counsel, in literally hundreds of such actions in federal courts. Typically, these suits involved the segregation of black and white pupils within a school district. Fund attorneys have also worked to eliminate segregation of Mexican-American or Hispanic children, however. In *Keyes* v. *School Dist. No. One, Denver*, No. 71-515, presently before this Court, suit was brought to reverse Denver school policies which separated black, Hispano and white pupils. In *United States* v. *Texas Educ. Agency*, No. 71-2508 (5th Cir., August 2, 1962), attorneys from the N.A.A.C.P. Legal Defense Fund and the Mexican-American Legal Defense Fund (some of whom were associated with the plaintiffs herein at an

earlier stage of the litigation) intervened in a case before the Fifth Circuit in order to fully protect the rights of black and Mexican-American students to a desegregated education in Austin, Texas. And, there are other examples, for we recognize that Negroes are served by the elimination of all racial and ethnic discrimination.

While many of these suits involved intra-district discrimination, we are also sensitive to the ways in which the State may structure its educational process with the result of disadvantaging blacks or other minority group children. *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964) dealt with the State's obligation to furnish equal educational opportunities to all schoolchildren; we are presently engaged in litigation in the lower federal courts which seeks to further define the State's obligation in the context of metropolitan areas. The instant case deals with inter-district discrimination resulting from the State's structuring of its educational financing system. The disparities flowing from the existing system make it virtually impossible for Texas school districts of predominantly Mexican-American population to raise sufficient revenues to even begin to meet the educational needs of its children.* The opinion and judgment below properly recognized and dealt with that discrimination and it should be affirmed. Amicus supports the result reached below because this is a case in which discrimination against Mexican-Americans and against poor people was proved, and the State told to eliminate it.

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* Many small predominantly black districts which formerly existed in Texas and which were similarly affected by the Texas school funding system, were eliminated as the result of the decision in *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd* 447 F.2d 441 (5th Cir.), *stay denied sub nom. Edgar* v. *United States*, 404 U.S. 1206 (1971).

This is not a case in which the lower court did, or this Court should, attempt to delimit the permissible remedy. Elimination of the features of the Texas system which discriminate against Mexican-Americans will also eliminate features which discriminate against (at least some of the Texas) poor, because in this case the proof showed a correlation between (district) taxable property wealth and personal income. That identity may not occur elsewhere; some large cities in other States have significant low-income and minority populations but high property value on a district-wide basis as the result of past capital expenditures. These cities also have a "municipal overburden" which affects their ability to raise funds for educational purposes. The remedy suited to eliminating the discrimination proved and found inherent in the present Texas system may not be suited to discriminatory features of other State educational funding systems. The primary interest of *amicus* here is that this Court affirm the judgment below because it is plainly correct, without passing upon more general questions which are not necessary to decision here and the resolution of which must depend upon the circumstances of each individual case.

ARGUMENT

I.

The Judgment Below Can and Should Be Affirmed Upon the "More Narrow" Ground of Decision by the District Court: That Texas' School Financing Scheme Worked a Substantial Discrimination Upon Predominantly Minority School Districts Without Any Compelling Or Even Rational Justification Therefor.

This case has been presented by the State of Texas and some *amici* as though it inevitably draws into question all aspects of education financing throughout the nation. While the District Court's opinion and order can be construed not only as invalidating the entire Texas system as it presently operates, but also as casting doubt upon the validity of similar schemes, they need not be so construed. Rather, they should be read in the context of this lawsuit, initiated by specific plaintiffs, seeking specified forms of relief on the basis of the evidence and argument presented to the District Court. Whatever this Court's views on the broader questions not necessary to the decision of this case, we urge that it administer justice to the plaintiffs in this case.

The amended complaint (App. 13) does not simply allege that the Texas education-financing system violates the equal protection clause. It claims, in behalf of all children of Mexican-American descent[1] who attend schools in the Edgewood District (Para. 3), that the Texas system violates the equal protection clause *because* it results in

[1] *See, e.g., Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Alvarado* v. *El Paso Independent School Dist.*, 445 F.2d 1011 (5th Cir. 1971); *United States* v. *Texas Educ. Agency*, No. 71-2508 (5th Cir., August 2, 1972); *Cisneros* v. *Corpus Christi Independent School Dist.*, 324 F. Supp. 599 (S.D. Tex. 1970).

significant disparities in financial support for education between the Edgewood District and other (predominantly Anglo) districts in the State, which occur solely because of differences in school-district property wealth and which are not reasonably related to any educational objective (Para. 12); and that the system thereby discriminates against Mexican-Americans (Para. 13).

The basic facts and conclusions pertinent to this narrow claim of racially correlated, unreasonable discrimination in education support were not disputed by defendants in the trial court.[2] The existence of enormous disparities was patent. Further, the Pre-Trial Order (App. 43), after noting that the facts were generally not in dispute (App. 45), specifically recites as conceded that the educational needs of children in certain named Texas school districts were no greater than the needs of children in the Edgewood district (Para. 24); that the educational costs in the named districts were no greater than those in the Edgewood district (Para. 25); and that more than 95% of the children in the Edgewood district are of

[2] For example, the motion which has been raised here: that the expenditure of financial resources for educational services, facilities and supplies is unrelated to the provision of educational opportunity (see pp. 13-17 *infra*), was not presented below, and appellees-plaintiffs had no occasion nor opportunity to rebut such a statement, which is at best contrary to generations of accepted educational practice.

While we subscribe wholeheartedly to the relevance and importance of intangible factors in education, *see McLaurin* v. *Oklahoma State Bd. of Regents*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 639 (1950); Coleman, J., et al., *Equality of Educational Opportunity* (1966), we are equally cognizant of the enormous impact of resource allocation upon educational offering and opportunity. See generally, Guthrie, J., et al., *Schools and Inequality* (1971). These views do not, however, compel identical expenditures for every student any more than that result is compelled by the decision below interdicting a system which provides the victims of racial discrimination with the fewest dollars, and those more fortunate who have lesser needs with the greatest resources.

Mexican-American descent (Para. 30), a far higher percentage than in the named districts (Para. 31).

That expenditure levels are lowest for Texas districts with heavy concentrations of Mexican-American students was amply proved and specifically found as a fact. Professor Berke's affidavit contained sample data showing that the ten wealthiest Texas districts, spending $815 per pupil, contain 8% minority pupils, whereas the four poorest districts, spending $305 per pupil, contain 79% minority pupils (App. 200-03). In addition, random sample data collected and analyzed by the U.S. Commission on Civil Rights and introduced into the record showed a strong correlation between the proportion of Mexican-American students in Texas school districts and expenditure levels (App. 98-99). Relying on these uncontroverted data,[3] the District Court explicitly found that Mexican-American students were discriminated against. 337 F. Supp. at 285.

Appellants try hard to ignore this significant fact by asserting that "the court did not rely at all on racial considerations in its determination of unconstitutionality. . . ." Brief for Appellants, p. 23. But this is not a case such as *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P.2d 1241 (1971) or *James* v. *Valtierra*, 402 U.S. 137 (1971), where the racial factor was either absent or subordinated. *Plaintiffs are all Mexican-Americans.* They claimed relief as and for Mexican Americans. And their claim based on

[3] An affidavit filed by Dr. Arena noted the past history of racially segregated housing and education in Texas. *See also, e.g., United States* v. *Texas Educ. Agency, supra; Cisneros* v. *Corpus Christi Independent School Dist., supra, aff'd* No. 71-2397 (5th Cir., August 2, 1972); *Blackshear Residents Org.* v. *Housing Authority*, Civ. No. A-70-CA-51 (W.D. Tex., Dec. 3, 1971); *Graves* v. *Barnes*, Civ. No. A-71-CA-142 (W.D. Tex., Jan. 28, 1972) (3-judge court).

race was specifically upheld. Nothing this Court does, therefore, should deny them relief to which they are entitled.[4]

II.

The Judgment Below Also Can and Should Be Affirmed On Its Holding That, Based Upon the Evidence Presented to the District Court, the Texas School Financing System Impermissibly Links Wealth and Educational Opportunity.

A related claim of plaintiffs—that the Texas system discriminated against them as poor citizens—was also resolved in their favor. Affidavits filed with the District Court detailed the case for a correlation between lower levels of support and poor districts. *See, e.g.,* Berke Affidavit, App. 193-200. District wealth was measured exactly as the State mandates that it be measured—by market value of all taxable property per student. No one contests the existence of this correlation, or the obvious fact that poor districts "are systematically incapable of raising as many education dollars as rich districts." Affidavit of Prof. Morgan, App. 241; Affidavit of Dr. Webb, App. 223-25.

Plaintiffs went further, however, and showed a correlation between the poverty of especially poor school districts, such as Edgewood, and the poverty of residents in such districts. See Berke Affidavit, App. 200. Defendants did not contest this evidence in the District Court,

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[4] Whether the solution adopted by the Texas Legislature to end discrimination against Mexican-Americans will, upon scrutiny by the court below, be found to pass muster under the equal protection clause upon other grounds, will depend upon the contours of the new financing scheme enacted, and thus other constitutional questions are not appropriate for resolution by this Court at this time.

and the Court expressly found for the plaintiffs that the poorest and richest districts by taxable property wealth were also, respectively, the districts with the lowest and highest income. "As might be expected," the Court found, "those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominantly minority in composition." 337 F.Supp. at 285.

On this appeal, the District Court's findings with respect to race and income are termed "unsound factual assumptions." Brief for Appellants, pp. 21-25. But the argument made against the District Court's finding of fact is based entirely on evidence and reasoning not presented to that Court, and is in any event both weak and not pertinent to the issues.

The argument raised by Appellants, and by some amici curiae, see Amicus Brief of Various Attorneys General and Others, pp. 66-70; Amicus Brief of Sup't of Schools, Los Angeles, and Others, pp. 22-25, is that data from various sources show that personal income does not necessarily correlate with property value in school districts, and that the proportion of Mexican-Americans does not necessarily correlate with expenditure levels. Neither the data nor the logic supporting this argument was brought to the District Court's attention. The Court's finding must be judged on the basis of the uncontroverted evidence presented to it. Whether a correlation exists *in Texas* between property wealth and income, or race and support, by district are "adjudicative," not "legislative," facts as Appellants contend. Brief, p. 22. The issue is not whether any of the districts involved is "poor," as Appellants mistakenly suggest, but only whether the poorest and richest districts, as measured by taxable property, are also re-

spectively the poorest and richest when measured by personal income. The district court's finding in this regard is amply supported by the evidence of record.

Even if Appellants' arguments and data are considered, the District Court should be upheld. Much of the material on which Appellants and other *amici* rely pertains to States other than Texas. See Brief, pp. 22-23. The only argument presented by Appellants which is probative of the issues in this case is that made in a recent law review article.[5] The argument is quoted at length in Appellants' Brief, pp. 21 and 24, and is essentially that the correlations testified to by Professor Berke are doubtful because the middle groups of districts do not show a consistent pattern. Actually, Professor Berke specifically addressed himself to the issue raised by Professor Goldstein. He said in his affidavit that, "while the relationship [of income and expenditures] near the average are somewhat mixed, they do not work against the prevailing pattern because the range (only $600 in income) is too small to be meaningful." App. 200. He then referred to a graph, App. 201, prepared at the Policy Institute, Syracuse University Research Corporation, which vividly demonstrates the correlation. A similar argument and demonstration was made in his affidavit with respect to the correlation between race and expenditures. App. 204.

Appellants were well aware at the trial level of the overlap commented on by Professor Goldstein. Among the cross-interrogatories propounded to Professor Berke were the following questions and answers (pp. 32-34):

> "Q-68 In view of your statement at page eight of your affidavit that, 'The correlation between the propor-

[5] *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano* v. *Priest and its Progeny*, 120 U. Pa. L. Rev. 504 (1972).

tion of Mexican-Americans and Negroes in the schools and the quality of school services is precisely the reverse of the income-school services relationship. That is, the lower the proportion of Mexican-Americans and Negroes, the higher the school expenditure the higher the proportion of minority group enrollment, the lower the resources devoted to education.', how do you explain the fact that in Table I, page six of your affidavit, that a sampling of school districts with a 32 percent ratio of minority pupils has $544.00 of state and local revenue per pupil when a sampling of districts with lower ratios of minority pupils, 23 percent and 31 percent, have lower state and local revenue per pupil [$483.00 and $462.00 respectively]?

"A-68 We're dealing with the same confusion in reading the figures that we have been earlier. The marginal differences in the center of a range are not significant nor determinative. The overall pattern is and the extremes are, and I think I've already covered that in regard to income.

* * *

"Q-71 How do you explain in Chart I at page 11 of your affidavit the fact of the districts sampled those districts with a percentage of Mexican-American enrollment of from 20 percent to 29.9 percent had higher per pupil expenditures of state and local revenue [$484.00] than those districts sampled with a percentage of Mexican-American enrollment of from 10 percent to 19.9 percent [$457.00]?

"A-71 The fact that the two sets of districts with the lowest proportion of Mexican-Americans are slightly inverted in regard to the order of the other districts is probably the least important factor on that entire table. What is important is that the districts with the

> lowest proportions of Mexican-Americans have the highest school expenditures, the districts with the highest proportions of Mexican-Americans have the lowest school expenditures, that the patterns is exceedingly well-marked and obvious, and that the difference of less than 20 some dollars per pupil in those top two sets of districts should not distract from the clear and marked disparities between the highest proportion of Mexican-American districts with only $292.00 per pupil and those at the top with approaching $500.00 per pupil."

No comment whatever was made by Appellants on this issue in their trial brief. Now, however, they raise the matter on the basis of a footnote in a law review article. The District Court accepted Professor Berke's analysis, which was subject to critical review by defendants, as were his credentials as an analyst of social science research; its finding was proper and amply supported.

III.

Many Issues Discussed by Appellants Need Not Be Resolved by This Court In Determining This Appeal, and They Are Problematical On This Record In Light of Appellants' Failure To Develop Them Below.

An issue on which much argument has focused in this Court is whether educational expenditures are in fact related to the quality of education supplied. Unlike many of the other issues argued by Appellants, this one was at least raised by them before the District Court. The claim has changed materially, however, and much that is now presented in its support was never presented to the District Court.

Defendants at the trial level did not question the fact that the cost and quality of education may be related. They contended only that the amount spent "does not *necessarily determine* the quality of the education which the students of the school district will receive," Pre-Trial Order, Para. 4(f), App. 44, and that the quality of education "cannot be determined solely on the amount of money spent per student," Defendants' Proposed Finding of Fact, No. 30, App. 74. (Emphases added.) The basis for this argument, moreover, was not the research data now presented to this Court, but the assertion that costs vary within geographical areas, and managerial capacities differ from district to district.[6] The District Court's implicit finding that cost and quality are related is entirely consistent with defen-

[6] Defendants' full argument in their Trial Brief on this point is as follows (p. 17): "First, the plaintiffs have apparently come to the somewhat questionable conclusion that educational equality can be measured solely on the basis of the dollars available per student. This completely evades the pure facts of life—costs vary dramatically within a geographical area as large as Texas, and it presupposes that the managerial abilities of all school districts, their governing bodies and administrations are of equal ability."

dants-appellants' trial argument. But appellants go much further in this Court. They argue that the District Court's decision must be reversed because it is not clearly enough established that "quality is money." They refer to the Coleman Report and other highly complex social science material as proof that education-finance reform, at least beyond a minimum support level, is pointless. The phrase "quality is money" comes from a book,[7] rather than from anything in the record of this case. This Court need assume no such sweeping finding by the District Court. All that the decision below signifies is that the money differences proved by plaintiffs in this case are material enough to warrant judicial intervention in light of their relationship to the other factors present, including race and poverty.[8]

Appellants invite this Court definitively to settle the extraordinarily complex dispute about money and achievement. The invitation should and must be declined. The District Court had ample evidence before it to warrant

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[7] Coons, Clune & Sugarman, *Private Wealth and Public Education* 25 (1970).

[8] To be educationally material, expenditures need not be shown to correlate with "achievement," as defined by the educational research professional. Dr. Coleman and others are interested in whether expenditure differences affect achievement levels in the basic academic skills, such as reading and writing, as measured by tests most responsible educators concede are socially biased and scientifically primitive both in conception and in administration. However, quality is not just achievement in basic skills, but access to all the material and non-material facilities and resources that experience has led us to believe are related to enabling students to become better citizens, earners, and human beings. A feeling of self respect, the ability to perform a manual skill, special capabilities of one sort or another, may be as important in terms of the objectives of public education as reading or writing achievement in English—especially if English is the student's second language. Furthermore, substantial evidence exists that money spent on teachers, or spent creatively, does make a difference even as measured by achievement test scores. See, *e.g.*, Guthrie, J., *Schools and Inequality* (1971).

its implicit finding that the money differences in this case are material.[9] No effort was made to challenge the evidence proving disparities in educational services and achievement, and none is made now. The attack launched is against a principle—"quality is money"—that has nothing to do with this case, and the evidence and argument marshalled for the attack proceed on an extremely narrow definition of quality (*i.e.*, achievement in basic skills), and is only one side of a highly controversial subject. Even if the subject were pertinent to this case, it should have been explored below; it would have been had it been properly raised by appellants.

Most of the arguments made in this Court to show that rational or compelling interests exist to support the present Texas scheme are advanced for the first time. This is not to say these arguments have merit; on the contrary, they are frivolous. But whatever arguable merit they may have, they are not properly before this Court, since underlying them all are issues of fact and law that require hearing and argument at the trial level. The sole rationale

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[9] The complaint alleged that "the children *in the Edgewood District* are provided a substantially inferior education compared to the children in other . . . districts." Para. 9, App. 21. (Emphasis added.) Affidavits demonstrated that cost was related to quality among the relevant Texas districts by several measures, including professional salaries, the degrees held by teachers, the proportion of teachers on "emergency" permits, student-counselor ratios, the number of professionals per 100 students, drop-out rates, achievement levels, etc. Berke Affidavit, App. 209-214; Morgan Affidavit, App. 241. The Superintendent of the Edgewood School District, Dr. Cardenas, specifically and eloquently testified to his funding problems, pointing out that, because of its sharply lower level of support, Edgewood "cannot hire sufficient qualified personnel, nor provide the physical facilities, library books, equipment and supplies afforded by other Bexar County districts." App. 234. And he documented the inadequate space and maintenance of Edgewood schools, their inadequate libraries and curriculum, the extremely large classes, the lack of counselors, the loss of federal matching funds, and the far higher-than-average dropout rate. App. 234-238.

for the present Texas scheme raised below—the need to foster and preserve local autonomy—was appropriately disposed of by the District Court. Furthermore, the opinion in this case rests, not only on the "compelling interest" aspect of equal protection, but also on the ground that not even a rational basis exists to support the discrimination inherent in the Texas scheme.

Among the arguments raised for the first time in Appellants' Brief are the claims that the only certain result of the District Court's ruling will be to put more dollars in the pockets of teachers, and that the ruling will exacerbate the problems of inner city schools. Appellants' Brief, pp. 40-45. The Amicus Brief for various Attorneys General claims that the ruling below will destroy the fiscal powers of the State legislatures; will lead to a shift from the property tax to other forms of taxation; will compel full state funding, with huge increases in overall spending; and, once again, will adversely affect the interests of urban areas and racial minorities. Brief, pp. 17-35, 83-99; in short, the same dire predictions which this Court has heard prior to its major decisions, such as *Baker* v. *Carr*, 369 U.S. 186 (1962).

Obviously, whether any or all of these things might come to pass is dependent upon the initiative of the Texas Legislature and not the judgment below. That teachers may get increased pay if Edgewood receives more funds is hardly a ground for criticism, even if the assertion were properly proved. The State is obliged only to eliminate the offending discrimination. This may be achieved by equalizing at any support level, or by basing disparities on rational policy grounds. The flexibility allowed State legislature under the District Court's flexibility allowed State legislatures under the District Court's rationale is broad indeed, and does not compel centralized financing

or control. Neither does the opinion create problems for inner city schools which they do not face today. Legislatures will obviously be free to adjust distribution formulae to provide for greater costs or needs associated with urban schools, or schools with high concentrations of low achievers.

The contention that Texas allows discriminations in support levels in order to allow and foster local control is, as the District Court found, not even a rational justification for the system. "Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth," the Court ruled, "they fail even to establish a reasonable basis for these classifications." 337 F. Supp. at 284. Local control implies the availability of resources sufficient to fund more than a minimum (often a State mandated) program. Districts like Edgewood have few local decisions to make. If local control and choice is the objective of the Texas system, the system fails to achieve its aim in many districts—especially districts which are predominantly poor and non-white. Furthermore, the extent of local control that actually exists is a matter of considerable dispute. State requirements now mandate much that local districts once used to determine, not because courts have ordered centralization, but because State legislatures have chosen it. The district court correctly perceived the lack of any correlation with reality in the arguments presented by the State.

CONCLUSION

The judgment below should be affirmed and the determination of the proper remedy left to the court below in the first instance.

Respectfully submitted,

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FILED
OCT 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*, *Appellants*,

v.

DEMETRIO P. RODRIGUEZ, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR HOUSTON I. FLOURNOY, Controller of the State of California AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR HOUSTON I. FLOURNOY, Controller of the State of California AS AMICUS CURIAE

Amicus hereby respectfully moves for leave to file a brief supporting the position of Appellees in the above-entitled case. Counsel for Appellees have consented to the filing of the brief attached hereto. Counsel for Appellants have not consented to its filing.

The interests of *Amicus* and his reasons for requesting leave to file the attached brief are as follows:

Amicus is the Controller of the State of California, and, therefore, is the Chief Fiscal Officer of the State of California. As such *Amicus* has a particular responsibility in any area relating to the fiscal obligations of the State. Since the activities of the *Amicus* as Chief Fiscal Officer may be substantially affected by the decision of this Court in the pending case, it is important to *Amicus* that his views be considered prior to the rendering of any decision.

In addition, *Amicus* has long been concerned with the fundamental fairness of the school financing scheme presently in effect in California and most other states. As early as March 3, 1969, the California Advisory Commission on Tax Reform, of which *Amicus* was Chairman, stated that "every child should receive an adequate educational program at the same property tax effort regardless of what school district the child may live in." Accordingly, in that report, *Amicus* and the Commission advocated a state-wide property tax for schools within California. Advisory Commission on Tax Reform, Tax Reform Report at 22 (1969). Thus, *Amicus* has long believed that the present California system of financing schools through local property taxes necessarily results in an inequality of educational opportunity. As a result of the decision of the California Supreme Court in *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971), *Amicus* has also come to believe that those inequalities, to which *Amicus* has long objected, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as similar provisions of the California Constitution.

Finally, *Amicus* is presently a defendant in the case of *Serrano* v. *Priest*, which is proceeding to trial following the decision of the California Supreme Court, *supra*, which reversed the sustaining of a demurrer in the case. As a result of the posture taken by other California authorities, there are several questions of fact which must be examined in the trial, and the trial therefore promises to be burdensome and expensive to *Amicus*. However, *Amicus* has determined that he cannot in good faith accept the defense urged for him by the Attorney General of the State of California, and has therefore been authorized to retain his own counsel at no expense to the State. Since a decision of this Court affirming the district court for the Western District of Texas would likely render the trial in *Serrano* v. *Priest* unnecessary, *Amicus* has an additional interest in seeking that affirmance.

As a result of the past background of *Amicus* in the area of educational financing, particularly through local property tax schemes, and further as a result of the participation of *Amicus* in the case of *Serrano* v. *Priest*, *supra*, *Amicus* has become thoroughly familiar with the issues presented to the Court by the pending case. *Amicus* believes that Texas and California do not presently provide their children with an equal educational opportunity unrelated to the wealth of the particular school district in which those children happen to reside. The need to end that wealth-oriented discrimination among the children of the State was recognized by the court below, and the court rendered the appropriate decision. Additionally, *Amicus* is convinced that there is no inherent reason why education should be financed through a scheme that relates expenditures to the assessed valuation of land within the school dis-

trict in which the educational facility is located. *Amicus* therefore requests that this Court grant leave to *Amicus* to file the attached brief in support of the decision rendered by the United States District Court for the Western District of Texas so that his views may be considered.

Respectfully submitted,

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BRIEF FOR

HOUSTON I. FLOURNOY, Controller of the State of California

AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Texas scheme for financing public school education primarily through local property taxes violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by making educational opportunity, as measured by expenditures for education, afforded to the children of that State depend upon the wealth of the particular school district in which such children reside and whether the decision of the United States District Court

for the Western District of Texas to that effect should therefore be affirmed.

PROCEEDINGS BELOW AND STATEMENT OF FACTS

Amicus believes that the proceedings below and pertinent facts have been adequately summarized in other briefs filed by the parties in this case and the various *Amici Curiae*, and *Amicus* will not further burden this Court with a reiteration thereof.

ARGUMENT

The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution Is Violated By Any Scheme Of Educational Financing Which Makes The Educational Opportunity Afforded By Public Schools To Children Within The State Depend, To Any Substantial Degree, Upon The Particular Wealth Of The School District Within Which Those Children Reside.

Briefly stated, the position of *Amicus* is that equality of educational opportunity is, and has always been recognized as being, among the most fundamental of interests. Accordingly, no state can be permitted to establish or maintain an educational system which provides a better education, as measured by educational expenditures, for the children of parents in more wealthy school districts than for the children of less fortunate parents. Since the Texas educational financing scheme, like the California educational financing scheme, accomplishes that result, it cannot withstand attack. *Tate* v. *Short*, 401 U.S. 395 (1971); *McDonald* v. *Board of Election* 394 U.S. 802 (1969); *Harper* v. *Virginia Board of Elections* 383 U.S. 663 (1966); *Serrano* v. *Priest* 5 Cal 3d 584, 487 P. 2d 1241 (1971).

Equality of educational opportunity is a *sine qua non* of successfully operational representative democ-

racy. It was in recognition of that importance that Thomas Jefferson wrote in 1796:

> "I think by far the most important bill in our whole code, is that for the diffusion of knowledge among the people. No other sure foundation can be devised, for the preservation of freedom and happiness."

T. Jefferson, 5 The Writings of Thomas Jefferson 396 (A. Lipscomb ed. 1905). Similar views were held by a substantial number of our country's founders. *See generally*, A. Hansen, Liberalism and Education in the Eighteenth Century (1926). At the time of the Revolution, most American schools were completely under local control, as a result of historical development in a frontier society. Nonetheless, of the sixteen state constitutions framed before the year 1800, six of them (in Pennsylvania, North Carolina, Vermont, Massachusetts, New Hampshire and Delaware) specifically asserted the state's responsibility for, and authority over, education. Similarly, the educational provisions of the Northwest Ordinance of 1787 reaffirmed the fundamental importance of education to a free society: "schools and the means of education shall forever be encouraged." Ordinance of 1787, Art. 3, § 14, 1 Stat. 51. In the words of Justice Holmes, education is "one of the first objects of public care." *Interstate Consol. St. Ry.* v. *Massachusetts*, 207 U.S. 79, 87 (1907). Thus, it has long been established that education is of substantial and fundamental importance to us as a people.

Moreover, educational opportunity is an ingredient of equality among citizens that can only be safeguarded by governmental action and is not likely to exist, as a practical matter, unless affirmative state action is taken. The Preamble to our country's Constitution recites that

all men are created equal, but without substantial equality of educational opportunity, the equality of men is doomed to end with their creation.

To permit the quality of a child's educational opportunity to be a direct result of the location of the house in which his parents reside is substantially to reduce the likelihood that he will be able to compete effectively with those of his peers whose parents live in a more favorable location. If that inequality were the result of free choice, there could be no constitutional objection to it. But it is not. It is, rather, a consequence of the combination of the wealth of the district in which the child's parents reside and the state-established financing scheme which limits educational expenditures by the ability of the school district to raise funds from within its boundaries. Indeed, in California [see *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971); California Advisory Commission on Tax Reform, Tax Reform Report, 22-24 (1969)] it is clear that children whose parents have chosen to burden themselves more heavily, in terms of the tax rate imposed, than parents in other school districts often generate *less* money to spend, simply because of the extreme disparities in assessed property values among the school districts. Substantially similar disparities exist in Texas, as found by the Court below in the case at bar. In these circumstances, it cannot reasonably be contended that states whose school financing scheme parallels that of Texas or California are doing anything short of denying an equal opportunity to some children within their jurisdiction.

The principle which must be upheld by this Court is that of fiscal neutrality in educational financing. Appel-

lees in the present case are doing no more than asserting their right to be relieved from a financing system which, as found by the Court below, functions to impose higher taxes in poor districts while providing better education in wealthy districts. With the increased concentration of wealth in certain geographic areas, the property tax based school financing system has become as discriminatory as the wealth-based system that it historically replaced.

As Controller of the State of California, *Amicus* has been involved in the functioning of an educational financing system similar to the structure here under attack. *Amicus* believes that there is no substantial state interest in, or justification for, maintaining such a sysem. It has been asserted that the present scheme retains local control within school districts. But to allow that unsupported assertion to control the decision in this case would be to allow the State to shirk *its* responsibilities to its children. Moreover, even if the vague notion of "local control" were viewed as a compelling state interest, the present system of school financing in Texas and California does not in fact further that alleged interest. Less wealthy districts, under the present scheme, can do no more than support a minimal educational system, and have no meaningful control over their educational budget. Conversely, adopting a state-wide financing scheme, in which all of the state's resources are used to support all of the state's children, does not imply that the state which is concerned with local control must usurp the local power to make decisions as to expenditures.

Indeed, not only would upholding the decision below not interfere with any substantial state interest; it

would advance a meaningful state interest. In 1968, Governor Ronald Reagan of California established an Advisory Commission on Tax Reform, and named *Amicus* to serve as chairman of that Commission. After approximately one year of study the Commission concluded that "[t]he present inequitable distribution of property tax resources among the various school districts is the direct responsibility of the state." Advisory Commission on Tax Reform, Tax Reform Report, 7 (1969). Accordingly, the Commission recommended to the Governor that a statewide property tax be established to support education. Affirmance by this Court of the decision below would be likely to facilitate that result, thereby furthering an expressed state interest while making meaningful the promise long held out to our children of a true equality of educational opportunity.

CONCLUSION

There is no actual state interest served by the particular school financing scheme presently in effect in Texas, which is in substance similar to the California scheme. Given that lack of any substantial interest, *Amicus* believes that the decision below to the effect that the present scheme violates equal protection requirements, must be upheld. Education is certainly a fundamental interest, and historically been recognized as such. Since equal educational opportunity cannot exist with substantially unequal expenditure levels, it is clear that children in poor districts are placed on a substantially less advantageous footing than children in relatively wealthy districts. Since school districts, and the financing scheme in general, are created and maintained by the state, it follows that the state is involved in discriminating on the basis of wealth in the educa-

tional opportunities made available to its children. No such practice is constitutionally permissible, and the decision below must therefore be affirmed.

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August 22, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL,

Appellants,

VS.

DEMETRIO P. RODRIGUEZ, ET AL,

Appellees

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR AMICUS CURIAE SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, by its authorized attorneys, respectfully submits an Amicus Curiae Brief in this case.

Interest of the Amicus Curiae

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, whose name this cause bears, is a political subdivision of the State of Texas and this Brief is sponsored by its authorized attorneys, as provided by this Court's Rule 42.

The San Antonio District was originally a party defendant to this suit, but was dismissed before judgment in order for the action to proceed against the State of Texas, since the judgment sought would affect all districts in the state.

As originally presented, Appellees' case centered around the consolidation of school districts on a county wide basis for school finance purposes, and thus, the San Antonio District and other districts in the county were party defendants. As broader concepts were developed and recognized in this case itself and in the literature and decisions on this vital subject, the San Antonio District and other districts of Bexar County were dismissed as parties defendant and the case properly proceeded to judgment on the issue of the constitutionality of a state imposed system of school finance.

Aside from its extra-legal interest because this historic case bears its name, the San Antonio District will be directly affected by the Court's decision on the constitutionality of the state imposed method of financing education in Texas.

The San Antonio District is a large school district having an area of approximately 75 square miles and about 70,000 children educated by its schools. It is composed of the central business district, some of San Antonio's industries and substantial residential areas. The position of this District is not a selfish one, but one of principle — that a quality education for the children of this District and this State is indeed a fundamental interest and that the present Texas law for financing public school education was rightly declared unconstitutional by the District Court.

The Argument

The current method of state financing for Texas public schools deprives those children living in school districts with low property values of the equal protection of the laws under the Fourteenth Amendment.

Those districts created under state law with areas of low property values, may tax at higher rates than a district having high property values, but, because of the difference in the tax base, produce less money for a child's education.

It is established in this record that in Bexar County the market value of property per student ranged from a low of $5,429.00 in the Edgewood District to a high of $45,095.00 in the Alamo Heights District and that the taxes as a percentage of property value were the lowest in Alamo Heights and the highest in Edgewood. Edgewood District's tax effort produced only $21.00 per pupil while that of the Alamo Heights District yielded $307.00 per pupil. The combined state and local result was $231.00 per pupil in Edgewood and $543.00 per pupil in Alamo Heights. Therefore, it was proved in the District Court that the state school financing laws based on property ad valorem tax preclude equal treatment because the money available for a child's education is dependent upon the location and value of property within the state created district in which the child lives.

While it is true that money alone is not the single requisite of a quality education, it is one of the essential requirements. Differences in school funds result in visible differences in physical facilities, teachers' salaries, the available scope and variety of programs and funds with which districts may innovate and adapt themselves to changing demands for education. For example, future education in some districts may focus on technical training rather than the traditional academic curriculum, yet significant program alterations of this sort will require money which is unavailable and unattainable to a district with low property values where such changes may be most needed.

The quality of education obviously varies in significant degree with the amount of money available to achieve it. The degree of such variance may be argued, but not the fact that it exists. As Appellants' Brief in this Court notes (page 35), every school district in the State of Texas has added by local effort to the so called state minimum program. The records thus proves that the state "minimum foundation" program

does not in fact serve its avowed purpose. It is not an acceptable program to a single Texas school district. All that remains is a state imposed system that denies the *opportunity* for one child's education to be the equal of another's.

Education is a fundamental interest in every sense of the words. The District Court was correct in holding that this principle has been established at least since *Brown v. Board of Education*. "Today, education is perhaps the most important function of state and local governments . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. 483, 493 (1954).

No one can deny that the vital necessity for education has greatly increased even since 1954. If it had not been previously recognized that education was in every sense a fundamental interest, it is unthinkable that this truth should be denied today.

The practical result of the District Court's ruling is not feared by the San Antonio District. The solution is left to the democratic legislative process. Local autonomy, consistent with equal protection of the law, can and undoubtedly will be preserved. While a reasonable measure of local controls of schools is desirable, the present statutory financing system should not be justified in the name of local control. The state imposed system which necessarily results in wide variations in expenditures for education should be subordinate to the goal of providing equal educational opportunity for all. *Griffin v. Prince Edward County School Board,* 377 U.S. 218 (1964).

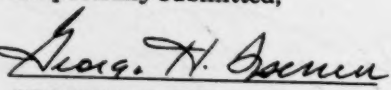
Conclusion

The present Texas school financing laws were correctly held unconstitutional by the District Court since they deny an equal opportunity for education because of state defined and commissioned governmental units and the required tax

system within those limits. Equal protection of the law is not afforded to the children residing in a poor district because of this classification. A child's education has properly been held to be a fundamental interest in the constitutional sense by the Court below.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, therefore, submits the District Court's judgment was right and that it should be affirmed.

Respectfully submitted,



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Certificate of Service

I, GEORGE H. SPENCER, Attorney for the San Antonio Independent School District, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of August, 1972, I served three copies of the foregoing brief upon the Appellants by depositing same in the United States mail, postage prepaid and addressed to Appellants' attorneys of record as follows: Hon. Crawford C. Martin, Attorney General for Texas, Box 12548, Capitol Station, Austin, Texas, 78711, and Mr. Charles Alan Wright, 2500 Red River Street, Austin, Texas 78705; and that I also served three copies of the foregoing brief upon the Appellees by depositing same in the United States mail, postage prepaid and addressed to the Appellees' attorneys of record as follows: Mr. Arthur Gochman, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, and Mr. Mario Obledo, 145 9th Street, San Francisco, California, 94103.

Geo. H. Spencer.

GEORGE H. SPENCER

Supreme Court of the United States

October Term, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, NATIONAL COALITION OF AMERICAN NUNS, NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., SOUTHWEST COUNCIL OF LA RAZA AND UNITED MINISTRIES IN PUBLIC EDUCATION

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IN THE

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October Term, 1972

No. 71-1332

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The undersigned, as counsel for the above named organizations, respectfully move this Court for leave to file the accompanying brief *amici curiae.*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights and the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. Its affiliate in Texas is the Texas Civil Liberties Union. In its 52-year existence, the American Civil Liberties Union has been particularly concerned that the guarantee of the equal protection of the laws be enjoyed by all persons without regard to race or economic condition.

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews, to implement Jewish values and to promote the principles of democracy. It has consistently operated on the principle that Jewish tradition requires opposition to injustice and inequality on the basis of race, religion, national origin and economic status.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a national membership of more than 500,000 men and women and their families. The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of the parent organization to advance good will and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It holds that the welfare and security of the Jews in the United States are inseparably related to the extension and preservation of equal opportunity for all; that an invasion of the rights of any racial, religious or ethnic group is a

threat to the safety of all groups and the individual members thereof.

The National Coalition of American Nuns is an organization of Roman Catholic Sisters whose purpose is to study and speak out on issues related to human rights and social conscience. The coalition was established in July, 1969. It numbers 1,937 sisters.

The National Catholic Conference for Interracial Justice is a service agency formed in 1960-61 out of the Catholic Interracial Council movement. It is an independent "lay" agency, not an official Church agency, though it is recognized by the Church and maintains close relationships with official national Roman Catholic agencies, with the leaders and structures of many local dioceses, and with a large number of religious orders of men and women.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. Several of the policies established by its General Board have affirmed support of public education for all children, especially for the poor. In particular, the Council holds that tax resources should compensate for rather than accentuate the inequalities caused by the accidents of birth.

The Scholarship, Education and Defense Fund for Racial Equality, Inc. (SEDFRE) is an independent, publicly supported national organization formed in September 1962 to assist local community organizations and civil rights

groups. Its objectives include solving of individual and neighborhood problems in the nation's rural and urban slums and providing an environment in which concerned citizens take the lead in achieving their human and constitutional rights.

The Southwest Council of La Raza is a private nonprofit corporation whose goals include providing program support and technical assistance services to barrio community development programs in several priority areas which include education opportunities. It has established as one of its major objectives the stimulation of interest in needed public educational system reforms so as to secure a public educational system which is genuinely responsive to the need of furthering the advancement of Mexican American educational attainment levels.

The United Ministries in Public Education (UMPE) is the joint agency of national boards, divisions and offices of the Episcopal Church, Presbyterian Church in the United States, the United Church of Christ, the United Methodist Church, and the United Presbyterian Church, U. S. A. Its purpose is to work on behalf of these churches, expressing their active concern and sense of accountability for education. The UMPE serves to support the public educational system where it is contributing to the humane development of persons and to call for reevaluation of the system where needed.

Each of these organizations believes that the outcome of this case will directly and substantially advance or retard efforts to end existing gross disparities in the quality of

education now being made available to children in our public schools. On the basis of their experience in combatting discrimination in education, they seek to submit to this Court the reason why they believe that the judgment below should be affirmed.

The annexed brief notes that the discrimination caused by the inequitable system of financing public schools in Texas primarily affects Mexican American children. It argues that, in a case like this where a clear showing of gross discrimination on the basis of wealth is not countered by any effort at justification, the courts must at least call the public officials responsible to account.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for appellees has consented. Counsel for appellants has not replied to our request.

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August 1972

IN THE

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October Term, 1972

No. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellants,

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DEMETRIO P. RODRIGUEZ, *et al.*,
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BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, NATIONAL COALITION OF AMERICAN NUNS, NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., SCHOLARSHIP, EDUCATION AND DEFENSE FUND FOR RACIAL EQUALITY, INC., SOUTHWEST COUNCIL OF LA RAZA AND UNITED MINISTRIES IN PUBLIC EDUCATION

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Statement of the Case

This suit was brought as a class action on behalf of Mexican-American school children and parents living in the Edgewood Independent School District in Bexar County, Texas, and on behalf of school children living in similarly situated school districts. It was filed on July 10, 1968, and named as defendants school districts and State and local officials. The complaint charged that the system of public school financing discriminated against school districts containing a large percentage of Mexican-American children. It was also charged that public school financing in Texas was discriminatory because wealth determined the quality of education in the various school districts. A three-judge District Court, duly convened in the Western District of Texas, entered its decision and judgment on December 23, 1971 (App. 259) and a clarification of the judgment on January 26, 1972 (App. 272). The District Court upheld the complaint but stayed entry of its judgment for two years in order to allow the Texas Legislature to take appropriate steps (App. 270). The case is here on direct appeal from the judgment of the District Court.

Statement of Facts

The workings of the system of public school finance in Texas are complex and in many respects unique to that State.* The system is described in detail in the record and the briefs of the parties submitted to this Court. It relies primarily on taxes levied on the value of real property in school districts, plus a supplemental contribution from the State, primarily under a "foundation" plan. Money resulting from the local property tax represents approximately one-half of all monies for public school financing in the State. School districts' tax bases vary considerably in the State—from below $10,000 of value per child to over $500,000, or a ratio of fifty to one. Predictably, this results in the spending by school districts of widely disparate amounts on the education of children. This inequity is in some respects heightened by the State's additional funding.

The Minimum Foundation Program (Texas Education Code §§16.01, *et seq.*) determines how the State's contribution is allocated to the school districts. The system of allocating some funds on the basis of the experience and education of the teachers hired by the school districts (See Texas Education Code, §§16.31, *et seq.* and 16.98) leads to State support of better quality education for the schools in wealthier districts. This is so because the school

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*The system is ably described in the second part of an article by Berke, Carnevale, Morgan and White, "The Texas School Finance Case: A Wrong in Search of a Remedy," which will be published in October in the Fall 1972 issue of *The Journal of Law and Education.*

district supplements State aid with its own funds, and richer districts can more easily supplement State funds than poorer districts. Moreover, better qualified teachers will generally go to those school districts offering them the highest salaries and the State gives school districts more money if they have better qualified teachers. In this and other ways, the State gives more money per pupil to wealthier districts, which are overwhelmingly white, than it does to poorer districts which tend to contain large concentrations of minority group children. This occurs even though poorer school districts tend to tax themselves, in general, at a higher tax rate than wealthier districts.

It is this system which results in the unequal treatment of poor and minority children by the State, which the court below, largely on the basis of uncontroverted evidence, found to violate constitutional standards.

Questions to Which This Brief is Addressed

1. May the judgment below requiring the appellants to end the unequal financing of school districts in Texas be affirmed on the ground that such unequal financing constitutes discrimination on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment?

2. May that judgment be affirmed on the ground that, aside from the matter of race, the proven inequality has not been justified on any reasonable grounds and therefore constitutes a violation of the Equal Protection Clause?

Summary of Argument

I. It has been clearly established, and the court below found, that school districts in Texas are unequally financed and that the districts which are best able to finance themselves have the lowest proportion of minority group pupils and vice versa. Even under the law as it existed prior to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), this constitutes a plain case of racial discrimination in violation of the Equal Protection Clause. Appellants presented no rational explanation or reasonable justification for this discrimination.

II. The evidence of inequality, considered independently of the racial character of the various school districts, reveals a system of school financing in Texas which provides more education for some children than it does for others. This by itself establishes a violation of the Equal Protection Clause.

(a) Appellants' arguments for reversal here rest primarily on issues not presented by this record. Offering no justification for the gross differences in expenditures, appellants argue rather that affirmance of the decision below would result in unmanageable problems of redress. Since the court below postponed the effective date of its decree for two years in order to permit the State of Texas to develop procedures for equalizing its schools, the question of the availability of effective relief is not before this Court. In addition, there is no evidence to support the dire predictions made by appellants as to the effects of the judgment below.

(b) The same is true of appellants' efforts to raise issues as to the whole range of public education problems throughout the United States. These arguments ignore the fact that there are substantial differences from state to state.

(c) Since appellants have failed to show any justification for the unequal treatment of public school districts in Texas, this Court should not make findings on questions which could and should have been the subject of evidentiary presentation below. It should rather find that the record presents a clear case of unreasonable classification in violation of the Equal Protection Clause.

Argument

The issue of the wisdom and constitutionality of unequal financing of public school districts and what steps, if any, should be taken to correct it has arisen in many parts of the country. We submit, however, that this case need not be treated as a vehicle in which all of the problems associated with that issue must be resolved by this Court. Regardless of how this Court may view the broad issue of equal financing of public schools, the decision below, we submit, would at least have to be affirmed on the basis of the narrow grounds outlined below.

What is before this Court is a single lawsuit initiated by specific plaintiffs, seeking specified forms of relief. It was litigated on the basis of the evidence and argument presented to the District Court. Whatever may be this Court's view on the broad questions here involved, it is called upon only to resolve the issues in this case. Those

issues are much narrower than the appellants' brief suggests. That brief focuses largely on the remedy. However, the remedy may never become an issue; it was not the subject of trial below; and it will at best be a separate question presented some two years in the future. Moreover, the brief argues factual questions which could and should have been the subject of an evidentiary presentation at trial and which are now raised for the first time in this Court. Furthermore, aside from race, it was established that there is gross disparity in the quality of education made available to children in the various school districts of Texas, unexplained and unjustified by any considerations of public policy. This Court is called on only to decide whether disparities exist in violation of the Constitution and whether, if so, some form of relief is called for, directed at correction of those disparities.

Affirmance of the decision below would not break new ground. It would allow the slow and orderly development of legal doctrine and legislative reform in Texas as well as in other states facing the same problems. It would, at the same time, constitute a reaffirmation by this Court of the "mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon,* 286 U. S. 73, 88 (1932).

POINT ONE

The judgment below should be affirmed on the ground that the record establishes discrimination based on race, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Appellees represent a class composed of Mexican American children and their parents in Bexar County and throughout the State of Texas (App. 13). As Chicanos, they have long been the orphans of the Texas school system. In the Edgewood District of Bexar County, where three-fourths of the pupils are Mexican American, the students have one-third as many library books per child as in neighboring Anglo districts, one-fourth as many guidance counselors, and classes which are fifty percent more crowded.

Nor is this pattern unique to Bexar County. As one of plaintiffs' expert witnesses declared (App. 196):

> There is a consistent pattern of higher quality education in districts with higher proportions of Anglo-Americans, and lower quality education in districts with lower proportions of Anglos.

Such deprivation—in light of this Court's injunction that education "is a right which must be made available to all on equal terms" (*Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954))—presents a classic case of racial discrimination.[1]

1. The above statistics were only a small part of plaintiffs' case below, which was built upon both factual and opinion evidence. Moreover, this uncontroverted evidentiary showing of discrimination has been confirmed by every study done in Texas. See, for example,

This Court has repeatedly held that racial discriminations are suspect and may be justified only if necessary to achieve a compelling state interest. *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Loving* v. *Commonwealth of Virginia,* 388 U. S. 1, 11 (1967). Indeed, discrimination of the type found here was repeatedly held by this Court to violate the Equal Protection Clause, even before the decision in *Brown.* In these earlier cases, stretching back as far as *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), this Court held that racial segregation could be constitutionally justified only if the State provided equal facilities to all races. For example, in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), the Court found a violation of equal protection where the law school for Black Texans was significantly inferior to the White law school in terms of library size, number and background of faculty, curriculum and availability of extracurricular activities. See also *McLaurin* v. *Oklahoma,* 339 U.S. 637 (1950); *Sipuel* v. *Board of Regents,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938).

As *Sweatt* makes clear, the evil condemned in these cases was neither racially separate education, nor racially

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U. S. Civil Rights Commission, Report, "The Unfinished Education" (1972). This report found that minority students in the Southwest —Arizona, California, Colorado, New Mexico, Texas—do not obtain the benefits of public education at a rate equal to that of their Anglo classmates. These minority students include Mexican Americans, Blacks and American Indians. Five standard measures were used: school holding power, reading achievement, grade repetitions, overageness, and participation in extracurricular activities. Disparities were shown on all these measures. The proportion of minority students who remain in school through the twelfth grade is significantly lower than that of Anglo students, with Mexican Americans demonstrating the most severe rate of attrition. College entrance rates reveal an even greater gap between Anglos and minority group students. Similar discrepancies are also found in reading achievement, grade repetition and overageness.

discriminatory deviation. Before *Brown*, neither segregation nor discriminatory intent was constitutionally suspect. Rather, in these decisions the Court was concerned only with the bare fact of racially unequal schooling. Where a law's effect was to deprive minority students of "education equivalent to that offered by the State to students of other races" (*Sweatt* v. *Painter*, *supra*, 339 U.S. at 635), this Court struck it down.

The decision in *Brown*, of course, did not sap the vitality of these decisions. As Judge Skelly Wright noted in *Hobson* v. *Hansen*, 269 F. Supp. 491, 496 (D.C., 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969):

> To the extent that *Plessy's* separate-but-equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance does not survive Brown. Nevertheless, to the extent the *Plessy* rule, as strictly construed * * * is a reminder of the responsibility entrusted to the courts for insuring that disadvantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes.

Judged by these longstanding and familiar principles, the Texas school financing system simply cannot withstand constitutional scrutiny. Plaintiffs' evidence, both statistical and opinion testimony, establishes the consistently inferior educational opportunities provided in districts with heavily minority populations. This evidence was undisputed by the State of Texas below. Texas called no witnesses and produced no testimony on the racial issue in the trial court. The State did not challenge the accuracy

or significance of plaintiffs' statistical evidence, nor contest the credentials of plaintiffs' expert witnesses.

The fact that the racial discrimination inheres in the Texas school financing system may not have been deliberate or willful does not preclude a finding that the resulting inequalities violate equal protection. The Courts of Appeals for all the major Circuits are in agreement that even unintentional racial discrimination may be unconstitutional. See, for example, *Hawkins* v. *Town of Shaw, Mississippi*, 437 F.2d 1286, 1291-1292 (5th Cir. 1971); *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.*, 436 F.2d 108, 114 (3d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968); *Southern Alameda Spanish Speaking Organization* v. *Union City, California*, 424 F.2d 291, 295-296 (9th Cir. 1970); *Hobson* v. *Hansen*, 269 F.Supp. at 497, aff'd in part, 408 F.2d 175 (D.C. Cir. 1969). See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).[2]

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2. Although this Court in *Jefferson* v. *Hackney*, —— U.S. ——, 92 S. Ct. 5724 (1972), declined to invalidate a state welfare scheme which paid a higher percentage of need to the predominantly white recipients in certain categories than to the largely minority recipients in other programs, in the absence of any showing of intentional discrimination, that decision is not controlling here for several reasons.

First, that case involved welfare, not education, which this Court has long recognized as "perhaps the most important function of state and local governments." *Brown* v. *Board of Education*, 347 U.S. at 493. See *Palmer* v. *Thompson*, 403 U.S. 217, 229 (1971) (Blackmun, J. concurring).

Second, unlike the recipients in the various welfare categories in *Jefferson*, who differed significantly in age, disability, and need, school children—whether Black, Brown, or White—are essentially similar. Certainly, it could not reasonably be said that White children have more critical educational needs than minority students, and consequently deserve better schooling. Indeed, the District Court's Pre-Trial Order specifically recites as conceded that the educational needs of the children in the predominantly White districts of Bexar County were no greater than those of the largely Chicano Edgewood pupils (App. 45). Thus, the rational basis for distinguishing among categorical aid programs in *Jefferson* is lacking in the instant case.

Appellants contend that the court below "quite properly" ignored appellees' claim of racial discrimination (Brief, p. 4; see also p. 23). However, the court below specifically found (App. 262):

> As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils while the poor property districts are low in income and predominantly minority in composition.[3]

Since appellees asserted their constitutional claim based on racial discrimination in their complaint and a factual finding on the point, based on compelling and unrefuted evidence, was made by the court below, this Court is in a position to affirm the judgment below on the basis of that claim, whether or not the judgment below was so based. See, for example, *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Texas' minority population is concentrated in school districts with low assessed valuations. Despite more stringent tax efforts, such districts simply cannot raise enough revenue through local property taxes to begin to match the

3. This finding on the factual issue raised by the complaint was based on an extensive record presented by appellees. The State made no effort to controvert this evidence. Its present attempt to discredit some of plaintiffs' statistical evidence (Brief for Appellants, p. 21) illustrates the danger of raising factual questions for the first time on appeal. Plaintiffs' expert witness presented a representative range of statistics and gave his interpretation thereof. Now the State—without any evidentiary support—has taken a carefully selected portion of those statistics and attempted to establish a different result. If that contention had been made in the trial court, plaintiffs could have rebutted the State's arguments with additional evidence. By raising these claims for the first time in this Court, however, the State has effectively foreclosed such rebuttal, thus depriving both the court below and this Court of a complete record.

educational offerings in the rich, White districts. Nor is this correlation accidental. At the time the present school district lines were being drawn, Texas courts were enforcing deed restrictions that barred Mexican Americans from all but the poorest neighborhoods (App. 232). See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

This pattern of rich White/poor Brown is apparent both in Bexar County, plaintiffs' home, and throughout Texas. Plaintiff children attend school in the Edgewood School District, which is at once the poorest and most heavily minority district in the county. Seventy-five percent of the students in Edgewood are Mexican Americans, and the district has an assessed valuation per pupil of $5,960. By contrast, the richest district in Bexar County, Alamo Heights, has only one-sixth the percentage of minority students and nearly ten times the tax base ($49,478 per student). The second wealthiest Bexar district, Northeast, contains only seven percent minority pupils and enjoys an assessed valuation of $28,202—five times that of Edgewood. These vast property value differentials are strikingly reflected in annual per pupil expenditures. Alamo Heights spends $558 per pupil annually (from State and local sources); Northeast expends $415. By contrast, property-poor Edgewood can pay only $248 to educate each child—less than half as much as Alamo Heights (App. 216, Table VII).

The spending differentials inexorably result in severely unequal educational opportunities, as shown by the tangible factors surveyed in *Sweatt*. In every category, Mexican American children of Edgewood are critically and consist-

ently shortchanged. In terms of physical facilities, for example, an Edgewood student has only 50.4 square feet of classroom space, while a White Northeast child enjoys 70.36 square feet—forty percent more (App. 236). Although the State provides all students with classroom texts, Edgewood cannot afford to purchase sufficient supplemental textbooks or library volumes. Its school libraries contain only 3.9 books per child; Northeast's libraries, by contrast, provide 9.42 books per pupil (*Id.*).

The Mexican American pupils of Edgewood suffer significant deprivation in terms of personnel, as well. The teacher-pupil ratio there is one to 28; in Northeast, one to 19 (App. 237). Consequently, each teacher in the minority district has 50 percent more students than in the White district. These faculty differentials are shockingly severe in auxiliary personnel. In Edgewood, 5,672 children must share each counselor, while virtually all-White Northeast has a counselor for every 1,553 students—or four times as many (*Id.*). At every turn, the Mexican American children of Edgewood are guaranteed an education inferior to that provided their Anglo counterparts across the county.

Bexar County's pattern of racially discriminatory educational offerings is mirrored throughout Texas. As plaintiffs' expert testified, a district's property wealth, and consequently its spending, is inversely proportional to its minority population (App. 196).[4] Thus, districts with over $100,000 per pupil in taxable property spend an average of

4. Random sample data collected and analyzed by the U.S. Civil Rights Commission reinforces this testimony concerning the inverse correlation between the proportion of Mexican American students in Texas school districts and expenditure levels (App. 98-99).

$815 per child per year and have 92 percent Caucasian students. However, districts with less than $10,000 in assessed valuation per pupil generally have a student population that is overwhelmingly minority (79 percent) and are able to spend only $305 per child per year.

The impact on educational quality can be illustrated in terms of two criteria. The richest, Whitest districts spent $413 per pupil on professional salaries—an indicator that subsumes professional training, length of tenure, and pupil-teacher ratio—nearly fifty percent more than the $276 per child expended by the poorest, most minority districts (App. 211, Table VI). Second, the predominantly White districts enjoyed twenty-two percent more professional personnel than the heavily minority districts (*Id.*). The deprivation suffered by minority group children is thus clear.

These grotesque spending differences cannot be attributed to a lack of devotion to education among minority parents, for the most objective evidence of a community's attachment to its schools—the rate at which its citizens tax themselves for learning—reveals precisely the opposite. The richest, heavily Anglo districts paid an average tax of 31 cents per $100 of property, while the poorest, predominantly Brown and Black districts taxed themselves at 70 cents per $100—or well over twice as much (App. 205, Table II). Thus, the Texas school system can best be characterized as one where the poorest and most oppressed pay more for less.

It is ironic, but not surprising, that the instant case, like *Sweatt* v. *Painter,* focuses on the educational system of the State of Texas. For it is clear that Texas has continued at

the primary and secondary school level the same pattern of racially unequal education that this Court condemned at the graduate level in *Sweatt*. Thus, 22 years after *Sweatt*, Texas is again before this Court, doggedly defending the same position rejected once before.

In large part, this case is for the Mexican American community of this country what *Sweatt* and *Brown* were for our Black citizens. It is an attempt by a substantial and disadvantaged minority to resort to a court of law for the orderly redress of discrimination visited upon them by the State. Their call for racial justice 150 years overdue should not be obscured in the theoretical issues of school finance now raised by Texas.

The racial discrimination issue is not an afterthought to the litigants here and to those millions who are interested in their behalf. It lies at the very core of this case. A failure to affirm the holding below in the face of the strong showing made in the record of racial discrimination against the Mexican American citizens of Texas would push the Chicano community back to the position of despair held by Blacks in our society two decades ago.

POINT TWO

The judgment below should be affirmed on the ground that the record establishes arbitrary discrepancies in the financing of school districts in Texas, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The facts reviewed in Point One, above, considered independently of the racial character of the various school districts, establish that the system of public financing of schools in Texas, brought about by the law of that State, provides more education for some children than it does for others. If Texas had announced that it was writing its laws with a view to providing more education in some districts than others, no one would doubt that it was denying equal protection. But the test under the Equal Protection Clause is not intent but result.

A. The Defenses Offered by Appellants Raise Issues not Before this Court.

The reversal requested here by appellants would have to be based on unsupported assumptions not appearing in the record and in most respects never even raised below.[5]

5. Among the arguments raised for the first time in Appellants' Brief are the claims that the only certain result of the District Court's ruling will be to put more dollars in the pockets of teachers, and that the ruling will exacerbate the problems of inner city schools. Appellants' Brief, pp. 40-45. The *amicus* brief for various Governors claims that the ruling below will destroy the fiscal powers of the State legislatures; will lead to a shift from the property tax to other forms of taxation; will compel full State funding, with huge increases in overall spending; and, once again, will adversely affect the interests of urban areas and racial minorities. Governors' Brief, pp. 17-35, 83-99. Increases in spending are sometimes generated by equal protection rulings, but are never necessary. The State is

Whether or not there is a rational explanation, in fact, for the gross differences in expenditures by Texas upon school children is a matter susceptible of proof. Texas, however, presented none. Whether or not there are judicially manageable standards (a) goes to the remedy, which is not at issue here and (b) is a subject of evidence and proof, upon which the State of Texas presented no evidence. In this procedural posture any action other than affirmance would be (1) based on incomplete information and, therefore, likely to be mistaken; (2) would be improper in not being based upon the record; (3) would provide limited guidance for similar litigation now in other courts, and (4) would foster further litigation and confusion. Phrased somewhat differently, a decision adopting any of the arguments of Texas which have no evidentiary foundation would provide no guidance for future litigation in which evidence is presented on the issues which Texas ignored below.

For example, there is no evidence to support the assertion that there would be a loss of local control. There was no expert testimony to this effect; there is no data as to the extent to which the State now controls and limits local options; there is no evidence as to the State's control (or lack of control) of curriculum, textbooks, length of school term, and other areas; and no educator or other expert tes-

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obliged only to eliminate the offending discrimination. This may be achieved by equalizing at any support level, or by basing disparities on rational policy grounds. That teachers may get increased pay if Edgewood receives more funds is hardly a ground for criticism, even if the assertion were properly proven. The flexibility allowed State legislatures under the District Court's rationale is broad indeed, and does not compel centralized financing or control. Neither does the opinion create problems for inner city schools which they do not face today. Legislatures will obviously be free to adjust distribution formulae to provide for greater costs of needs associated with urban schools, or schools with high concentrations of low achievers.

tified that equalization in Texas would cause any loss of local control. Moreover, the extent to which there would be more or less control depends upon the legislative response and the remedy, to be evolved during the two-year waiting period ordered by the court below.[6]

Texas also argues that the decision of the Court below would lead to a financial crisis in education. Again, there is nothing in the record showing that this is possible, much less probable. No expert on financial affairs, educator or school administrator, even hinted at any such result. Moreover, this argument also goes to the relief. Obviously, some remedies would clearly improve the financial position of education while others might pose difficulties. In addition, all of the available public information demonstrates that financial crisis already characterizes public education in America even today, in its unequalized form. Voter rejection of school bond issues has become commonplace all over the country.[7]

Moreover, appellants simultaneously prophesy a great reduction in expenditures creating a crisis in education and an enormous increase in expenditures causing fiscal

6. If this issue were properly before the Court, it could be argued that, under equalization, poor districts would for the first time have real control over decision-making since they now lack the resources to make control a reality. Districts would still be left free to concentrate spending in particular areas and to innovate or to institute compensatory programs. Under many proposed formulae for equal school financing, local voters in all school districts, rich and poor, would have far more choice than under the present system to decide how much they value education as opposed to other services.

7. In Detroit, a $101 million dollar school deficit is projected for next year. The Board of Education plans to operate schools there for only 117 days instead of the State-required 180, to minimize the fiscal disaster, and to cut teacher payrolls by 35%. *Time Magazine*, June 19, 1972, p. 42.

difficulties. Both of these arguments are without any support in the record, both cannot be simultaneously true and, of course, there is no reason why either should be the case.

In brief, the arguments about financial crisis are wholly unsupported by the record, are premature, run contrary to available information about the state of public education in the United States, and are logically inconsistent.[8] Most

8. The arguments of appellants about the relationship between expenditures and quality of education also lack logical and evidentiary support. Texas introduced nothing into the record on this question. Indeed, their "Trial Brief" deals with the issue in just two sentences, neither of which raises the arguments they now advance (Defendants' Trial Brief, p. 17). Worse, Texas argues simultaneously that increasing sums of money will not enhance education in poor school districts and that decreasing money to the good school districts will destroy those districts. Appellants assert in effect that spending does not affect education; that decreased spending by the "best" (i.e., rich) districts will affect the quality of education; that equalizing spending on a statewide basis would be done at a level which would not help the poor districts and that a mass exodus to private schools would result. None of these assertions has any support in the record. Moreover, they contradict each other.

Indeed, defendants at the trial level did not question the fact that the cost and quality of education may be related. They contended only that the amount spent "does not *necessarily determine* the quality of the education which the students of the school district will receive" (App. 44), and that the quality of education "cannot be determined solely on the amount of money spent per student" (App. 73) (emphasis added). The basis for this argument, moreover, was not the research data now presented to this Court, but the assertion that costs vary within geographical areas and managerial capacities differ from district to district (Defendants' Trial Brief, p. 17).

Appellants go much further in this Court. They argue that the District Court's decision must be reversed because it is not clearly enough established that "quality is money." But all that the decision below signifies is that the money differences proved by plaintiffs in this case are material enough to warrant judicial intervention, in light of the other factors present, including race and poverty. To be educationally material, expenditures need not be shown to correlate with "achievement," as defined by the educational research professional. Quality is not just achievement in basic skills (as measured by socially biased and scientifically primitive tests). It includes as a minimum

important, those arguments would only be appropriate when and if a specific remedial decree is being considered.

That is not the situation now. The court below specified that "The mandate of this cause shall be stayed * * * for a period of two years in order to afford the defendants and the Legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law * * * in the event the Legislature fails to act within the time stated, the court is authorized to and will take such further steps as may be necessary * * *. Needless to say, we hope that no further action by this Court will be necessary" (App. 271-72).

Over 80 years ago, this Court said in *Liverpool, etc. Steamship Co.* v. *Commrs. of Emigration*, 113 U.S. 33, 39 (1885):

> [The Supreme Court] is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

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access to all the material and non-material facilities and resources that experience has led us to believe are related to enabling students to become better citizens, earners, and human beings.

Many of the same comments apply to appellants' assertion that the cities will be injured by the decision below. This contention is again unsupported by expert testimony, statistics or facts of any kind. Moreover, the court held only that school spending cannot be made a direct function of local wealth. The decision of the court does not change the political equation. If education costs more in the cities than in rural areas, the Legislature could clearly respond by providing more funds for the cities without in any way violating the decision below.

Similarly, this Court said, in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947):

> • • • (C)onstitutional issues affecting legislation will not be determined • • • in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of • • •

Again, in *Sweatt* v. *Painter*, 339 U.S. 629, 631 (1950), this Court said:

> We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible.

See also *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934).

We respectfully submit that these principles directly apply to the instant case.

B. Appellants Improperly Raise Issues as to School Financing in States Other than Texas.

Appellants have attempted to characterize this case as involving questions applicable to the whole range of public education problems throughout the United States, ignoring the fact that there are substantial differences from State to State. A careful factual showing (uncontroverted by any evidence) was made below of the relationship between money expended and quality of education in Texas schools,[9]

9. Appellants invite this Court to deal definitively with the extraordinarily complex dispute about money and achievement in all circumstances for all school districts. The invitation should, and must, be declined. The District Court had ample evidence before it

of the inadequacy of equalization and foundation programs in Texas, of a history of discriminatory housing patterns in the Southwest, of the insufficiency of the tax base in many school districts, and of a close correlation between minority group enrollment in school districts and poor quality education. These factors may not appear, or may appear to a lesser extent, in other States.

The court below expressly found that "the adverse effects of this erroneous assumption [the assumption that property within a district will be sufficiently equal to sustain comparable expenditures] have been vividly demon-

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to warrant its finding referred to below, that the money differences in this case are material. The complaint alleged that "the children *in the Edgewood District* are provided substantially inferior education compared to the children in other * * * districts" (App. 21) (emphasis added). Affidavits demonstrated that cost was related to quality among the relevant Texas districts by several measures, including professional salaries, the degrees held by teachers, the proportion of teachers on "emergency" permits, student-counselor ratios, the number of professionals per 100 students, drop-out rates, achievement levels, etc. (App. 209-214; 241). The Superintendent of the Edgewood School District, Dr. Cardenas, testified to his funding problems, pointing out that, because of its sharply lower level of support, Edgewood "cannot hire sufficient qualified personnel, nor provide the physical facilities, library books, equipment and supplies afforded by other Bexar County districts" (App. 234). And he documented the inadequate space in, and maintenance of, Edgewood schools, their inadequate libraries and curriculum, the large classes, the lack of counselors, the loss of Federal matching funds, and the far higher-than-average drop-out rate (App. 234-238).

No effort was made to challenge the evidence proving disparities in educational services and achievement for these plaintiffs in the State, and none is made now. The attack launched is against a broad principle—"quality is money"—that has nothing to do with this case, and the evidence and argument marshaled for the attack proceeds on an extremely narrow definition of quality (i.e., achievement in basic skills), and is only one side of a highly controversial subject. Even if the subject were pertinent to this case, it should have been explored below.

strated at trial through the testimony and exhibits adduced by plaintiffs'' (App. 261). This Court cannot know whether this finding would or would not be applicable in another State or upon a different record. An affirmance here can be based on the narrow ground that, on the record in this case, there has been a gross and unjustified discrimination based on poverty.

Similarly, the discriminatory patterns in Texas may not be present in other parts of the country. The equalization and foundation programs so inadequate in Texas may well work better in other states. The percentage of cost of education borne by the State (as opposed to the local community) and the precise spread between richer school districts and poorer bears heavily upon the question of local control. The high percentage (over 50%) borne by the State of Texas shows the deep involvement of that State in seeing to it that, in fact, local options do not come into play. It is on the basis of this record, not speculation as to the situation in other states, that this case should be decided.

C. Appellants have Failed to Show any Justification for the Unequal Treatment of Public School Districts in Texas.

The court below found that, ''Not only are defendants unable to demonstrate compelling State interests for their classifications based upon wealth, they fail to establish a reasonable basis for these classifications'' (App. 266). As we have seen, this conclusion quite accurately reflects the record before this Court.

Accordingly, it is not necessary to consider whether the "compelling State interest" test applies to this case.[10] Appellants have failed to satisfy the elementary test applicable as a minimum in all equal protection cases by establishing a "reasonable basis" for the State's discrimination.

Appellants appear to be urging that the reasonableness of the system is demonstrated by the fact that it has been in existence for 50 years (Brief, pp. 38-39). Similar arguments of course have been used to justify racial segregation, denial of counsel for criminal defendants, onerous restrictions on the right to vote and other practices that have been condemned by this Court. The argument can hardly be viewed as a statement, much less as evidence, of a reason for preserving the system.

Texas is, in effect, asking this Court to make findings on questions which could and should have been the subject of an evidentiary presentation below. For example, is the State's desire to encourage local educational experimental programs one reason for differences in expenditures from district to district? If so, has a single experimental program ever emerged in fact as a result of giving one school

10. As indicated in Point I of this brief, *amici* believe that the compelling state interest test should be applied in this case because, since this is a case of racial discrimination, the classification is inherently "suspect", carries a "very heavy burden of justification", and is subject "to the most rigid scrutiny." *Korematsu* v. *United States, supra; Loving* v. *Virginia, supra; McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964). Moreover, enjoyment of a quality education is a fundamental personal right. See note 2, *supra.* Regardless of the basis upon which a classification conditioning such rights is made, the conditioning must be justified by a compelling state interest. See, e.g., *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Certainly, the court below was correct in its conclusion that appellants have not met this test.

district twice as much as other districts? Indeed, is there any factual basis for the assumption that local control of schools requires that each school district expend upon itself the money it raises within its own district? If Texas had made any effort to prove that rational basis below, the evidence might well have shown that there was no local control in any realistic sense and that the State already controls curriculum, textbooks, and every other important detail of the educational process. If so, local control as a rational basis for the financing scheme might have proven to have had no basis in fact.

Here again, Texas is in effect inviting this Court to intrude upon the domain of the Legislature. For example, is it in fact a goal of the Texas Legislature to foster local control or, on the other hand, is it the intention of that State body to encourage greater centralization of decision making for its school systems? This Court should not and need not be in a position of telling the State of Texas what its educational and financial objectives should be.

Finally, the absence of evidence showing a rational basis also means that any decision which *assumes* that some rational basis exists will not be effective in precluding further litigations, because litigants will bring cases designed to *show* as a matter of fact that no rational basis exists.

By saying that there is no proof of even a rational basis, all this Court would be doing is asking the Legislature to look at reason as the basis for distributing money. *Cf. Lindsey* v. *Normet*, —— U.S. ——, 92 S. Ct. 862 (1972) (irrationality in wealth classification). Such action represents the most minimal intrusion by the judiciary. Once

the legislative body is forced to use minimum rationality as the criterion for distributing school funds, it seems fair to predict that all segments of our society are likely to benefit. Affirmance on this ground would also fully preserve the integrity of the court system. It would amount to a simple statement that litigants are going to have to try these issues so that the courts may decide them on the basis of substantial evidence rather than speculation.

Totally aside from the absence of factual support for the argument of Texas that there is a rational basis for the scheme, even its theoretical arguments are far from compelling. Although it may be emotionally appealing to talk about "local control," there is simply no rational reason why that goal cannot be accomplished without the onerous discriminations of the present scheme. In fact, the decisions below provide the first opportunity in several decades to return decision making to smaller communities and to provide them with the resources to carry out their priorities.

In this framework, to talk about the decisions below as a limitation on the freedom of the States or as undermining home rule not only has (and could have) no basis in evidence before the Court but is directly contrary to the realities of public education in our society. Moreover, that again goes to the remedy which has not been reached by the court below. Equally important, even assuming the legitimacy of the goals advanced, the State has not advanced any rational reason why one school district must have three times as much as another district to further those goals, especially when the school districts being shortchanged are overwhelmingly poor and minority group. Finally, but of crucial importance to the *Amici* here, the

system has no rational basis because those children with the most pressing educational requirements are receiving the most inadequate education.

Conclusion

In light of the record, the judgment of the lower court was the minimum warranted by the evidence. There is nothing before this Court that would support the extension of the decision below in the way contended for by the State of Texas. By staying its decree for two years, the court below accorded due respect for the legislative process, prescribed no remedies, and dealt only with the clearest kind of gross inequities on a virtually uncontroverted record. We respectfully urge that its judgment should be affirmed.

Respectfully submitted,

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August 1972

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

REPLY BRIEF FOR APPELLANTS

The arguments presented by appellees and their friends are the arguments that have been advanced by the advocates of reform in the literature on this subject that has developed in the last few years. They were anticipated by appellants in our main brief and, we think, adequately disposed of there. Only a few points need be made by way of reply.

1. The first of these points is to make clear again what this case is *not* about, for some of the arguments presented in support of the judgment below go to issues that are not now before the Court.

The issue is not whether children in some Texas districts receive less than an adequate education. Plaintiffs did not seriously claim below, nor did the District Court find, that Texas has failed to provide them with an adequate education.

Nor, despite some contention by plaintiffs (Appellees Brief 15), is this a case in which a state has imposed an arbitrary limit that makes it impossible for

some districts to spend as much as they would like on education. It is true, as plaintiffs point out, that the maximum rate for school maintenance is $1.50 per $100 valuation, TEXAS EDUCATION CODE § 20.04(d) (App. 330), although additional taxes can be levied to retire bonds, *id.* § 20.04(b) (App. 330). In 1969-70 the rate for school maintenance taxes in the Edgewood District was 55¢ (App. 174).[1] It will be time enough to consider whether Texas can validly limit the tax rate for school maintenance when some district is taxing to the limit and complains because it cannot tax more.

The imperfections and anomalies in the formulae by which the state assists public education, on which we commented in our initial submission (Appellants Brief 11), are also not the issue. Those defects are under intensive review in Texas and the observations about them by amici are quite pertinent (Serranos Brief 16 n. 2), but amici concede "it is not this part of the finance scheme which gives rise to the system's unconstitutionality" (Serranos Brief 15).

What the case *is* about is that Texas, like every other state, allows local school districts to tax in order to provide money for their schools in excess of that made available under the state foundation program and that the districts vary widely in the amount of property within them subject to the ad valorem tax. The constitutionality of this long-established and universally practiced means of financing public education raises an important question for this Court. Thus it is rather surprising to find the briefs for the plaintiffs and for two of the principal amici approaching the case as if it were an automobile accident case in which the appel-

[1]The figure of $1.05 shown at Appellees Brief 14 is the combined rate, on an equalized basis, for both maintenance and bonds. (App. 226).

late court is confined to the record below in determining whether there is support for a jury verdict.

Defendants are repeatedly accused of having "largely ignored the record" (Appellees Brief 8), of relying on arguments that were not presented below (ACLU Brief 13, 18; NAACP Brief 8, 9, 15), and of seeking to "retry this case *de novo*" (Appellees Brief 43). The suggestion that no evidence was presented below contesting the plaintiffs' assumptions that "quality is money" and that individual poverty coincides with district poverty is simply wrong, as we shall show.[5] To the charge that we have called the attention of the Court to material that "pertains to States other than Texas" (NAACP Brief 10; see also ACLU Brief 28) and that the phrase "quality is money" comes from "a book, rather than from anything in the record of this case" (NAACP Brief 14) we cheerfully plead guilty.[6] As the lengthy list of amici on both sides indi-

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[5] Pp. 4-6 below.

The further suggestion by an amicus that defendants were derelict for failing to comment in our trial brief on the questions we had put to a witness for plaintiffs raising one of these points (NAACP Brief 12) reflects an unfamiliarity with the course of the proceedings below. Although this case had been pending since 1968, the prepared testimony of plaintiffs' experts was not furnished to defendants until October 5, 1971 (Appellees Brief 7). On that day, as the docket entry reflects (App. 8), the court ordered all discovery to be completed within 30 days and ordered defendants' trial brief filed by November 15th. The depositions then taken were not transcribed and filed until dates ranging from November 22nd to December 7th (App. 8-9). Defendants protested this unusual schedule vociferously in their trial brief, observing that "the lengthy cross-examination by Defendants is not yet ready for use in either preparing this brief nor is it likely to be ready sufficiently in time for the Court to give it ample consideration prior to the hearing on the merits in this case" (Defendants Trial Brief 3).

[6] But cf. the testimony of Professor Berke that "dollar expenditures are probably the best way of measuring the quality of education afforded students * * *" (Berke Deposition 10).

cates, this case is of nationwide significance. In giving a reading to the Fourteenth Amendment that can be applied in 50 states,[*] we assume that the Court will continue in the tradition well-established at least since *Muller* v. *Oregon*, 208 U.S. 412, 419-421 (1908), that it will not consider itself bound by the conclusions Professor Berke draws from his sample of data, and that its vision will not be limited to a comparison of Edgewood with Alamo Heights.

2. We devoted some attention in our initial submission to the assumptions that "quality is money" and that district poverty can be equated with individual poverty (Appellants Brief 16-25). On both of these points there is conflicting evidence in the record. Professor Berke testified that dollar expenditures are the best way of measuring quality.[*] Assistant Commissioner Graham, a witness for defendant, was asked whether the quality of education that students in various school districts receive could be determined merely on the basis of the amount of funds spent per student, and replied: "No, I don't think you can determine it merely on the amount of money spent per student, no" (Graham Deposition 38). After developing at some length his thesis that other factors are involved, he concluded by saying "it is not just necessarily the money, no. It is how wisely you spend it" (Graham

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[*] A decision by the United States Supreme Court, however, attempting to differentiate among the states, would be entirely inappropriate. It would be most unwise to have basically similar state systems held invalid or valid depending on where the state's poor lived, or more accurately, depending on judges' views of the difficult statistical analysis demonstrating a correlation between poor people and poor school districts.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny*, 120 U.PA.L.REV. 504, 525 (1972).

[*] Berke Deposition 10, quoted note 3 above.

Deposition 39).[*] The judgment below assumes that money is the measure of quality but it made no finding on this point. Professor Coons and his associates recognize that they can do no more than "assume" that dollars are a reasonable measure of quality. COONS, CLUNE, & SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970). We have already presented to the Court data from many responsible sources casting grave doubt on that assumption and suggesting that beyond some minimum there is reason to believe that there is no relation between expenditures and quality of education.[†]

The trial court did find a relation between family income and market value per pupil of taxable property

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[*]Amici are correct that our further citation of the Stockton deposition on this point was inadvertent (Serranos Brief 20).

[†]Appellants Brief 16-20.

Other studies that have subsequently come to our attention are to the same effect. BROOKINGS INSTITUTION, SETTING NATIONAL PRIORITIES: THE 1973 BUDGET 357 (1972): "The statistical tests that have been performed seem to indicate that school resources do not have much independent effect on school achievement, after controlling for other factors." Averich et al., *How Effective is Schooling? A Critical Review and Synthesis of Research Findings*, FINAL REPORT TO THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE 155 (RAND Corporation, 1971): "Finally, the educational practices for which school systems have traditionally been willing to pay a premium do not appear to make a major difference in student outcomes. Teachers' experience and teachers' advanced degrees, the two basic factors that determine salary, are not clearly related to student achievement. Reduction in class size, a favorite high-priority reform in the eyes of many school systems, seems not to be related to student outcomes."

To the objection that the evidence we have cited on this point deals only with test scores and the attainment of cognitive skills (NEA Brief 31-32; Serranos Brief 26-27), we note that this is the measure used also by the Rand Corporation in its report of the President's Commission on School Finance, from which we have just quoted, because research efforts on non-cognitive outcomes "are sparse and largely inconclusive and offer little guidance with respect to what is effective." *Id.* at ix.

See also generally Finn & Lenkowsky, *"Serrano" vs. the People*, COMMENTARY, September 1972, at 68.

(337 F.Supp. at 282, App. 262). The only evidence in the record on the point is the table prepared by Professor Berke (App. 198-200; reproduced also at Appellants Brief 21).* Although he concludes from his data that a relation is adequately demonstrated by looking only to the small number of districts in the groups at each extreme, the propriety of ignoring the data from the much greater number of districts in the three middle groups was challenged in the defendants' cross-examination of him (Berke Deposition 26; see also *id.* at 29-30). As we have shown the Court, an independent scholar, reviewing the same data, has concluded: "At the least, the study does not support the affirmative correlation of poor school districts and poor people stated by the court and the affiant * * *" (Appellants Brief 21, quoting Professor Goldstein).* Other studies made in Kansas and California also refute the notion of a correlation between poor people and "poor" districts (Appellants Brief 22-23).

The important point about these matters is that it is essential to plaintiffs' thesis that these two assump-

*Appellees twice say that Dr. Stockton, a witness for defendants, "testified that a district's assessed valuation is a reasonably accurate measure of income within a district" (Appellees Brief 13; id. at 43). In fact Dr. Stockton was asked whether the assessed valuation figures give an accurate picture of "the taxpaying ability" of a district. He answered that it was "reasonably accurate" because taxes have to be paid out of income and it is no longer true that we can "measure how much income a person had for paying taxes by the amount of property he had" (Stockton Deposition 21).

*Correlation is a matter of precise calculation rather than of conclusion by an expert. The data on which Professor Berke relied do show a very positive correlation, 0.973, between market value of taxable property per pupil and state and local revenues per pupil. They show a negative correlation, though less complete, of –0.663 between percentage of minority students and revenues per pupil. The correlation, however, between family income and revenues per pupil is only 0.064, suggesting that there is no direct relation between educational spending and family wealth.

tions be accepted as true. It is not essential to defendants' position that they be regarded as false. Even if they were true, it would not impair our legal arguments for the rationality of the Texas system and that rationality is all that we need demonstrate. To the extent that they are uncertain, and this is the best that so far can be said of them, they indicate that this is an area in which legislatures must be left free to decide which group of social scientists to believe and that a constitutional mandate cannot be rested on them. Thus it is surprising to read that we have invited "this Court definitively to settle the extraordinarily complex dispute about money and achievement" (NAACP Brief 14; see also ACLU Brief 28). That is precisely what we think the Court cannot and should not attempt to do—but what it would have to do to affirm the judgment below. We submit that so long as these assumptions "remain fighting matters among those concerned about these things" (Appellants Brief 25) the Court should remain out of this thorny fiscal and educational thicket. Legislatures that accept the assumptions would be free to act upon them. Those that share our agnosticism[18] on the point would remain free to provide each district with the minimum number of dollars necessary to ensure an adequate education while allowing districts to decide for themselves whether they find these assumptions persuasive.

3. Plaintiffs and their friends virtually ignore *Gordon* v. *Lance*, 403 U.S. 1 (1971), *Lindsey* v. *Normet*, 405 U.S. 56 (1972) and *Jefferson* v. *Hackney*, 92 S.Ct. 724 (1972). The significance of these recent and authoritative decisions has already been discussed by

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[18] Social science has much to say about the cost/quality problem but the net effect is agnosticism.

Coons, Clune, & Sugarman, *A First Appraisal of Serrano*, 2 YALE REV. OF LAW & SOCIAL ACTION 111, 114 (1971).

us (Appellants Brief 31-35). Our opponents do attempt to distinguish *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *James* v. *Valtierra*, 402 U.S. 137 (1971), though on grounds that are likely to be good for this day and train only. The deprecation of welfare as "a form of governmental largesse" (Appellees Brief 30), of housing as "a purely economic interest" (Appellees Brief 41-42), and of the two together as merely "commonplace interests" (Serranos Brief 33) is hardly likely to represent the view of plaintiffs, or of the groups that support them, once the demands of advocacy in this litigation are behind them. This Court, by contrast, has said that welfare "involves the most basic economic needs of impoverished human beings," *Dandridge*, 397 U.S. at 485, and it has refused to "denigrate the importance of decent, safe and sanitary housing." *Lindsey*, 405 U.S. at 74.

With almost all of the comments in the briefs of the other side about the importance of education we agree.[11] But the implication that anything that is important is "fundamental" in the constitutional sense is refuted by *Dandridge*, *Lindsey*, and *Jefferson*. Indeed it would lead to the astonishing result that a legislature is subject to critical scrutiny and must satisfy the "compel-

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[11]The suggestion, however, by one group of amici that except for New York, which requires in its constitution that the state provide for welfare, education is the only service that is constitutionally mandated by the states (Governors Brief 10, 1a-3a) is incorrect, as the most cursory reference to INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. 1959) demonstrates. The following are illustrative examples, chosen from many that are available, of state services specifically mandated by various state constitutions: public health (Alaska Const., Art. 7, § 4; Michigan Const., Art. 4, § 51); parks (Missouri Const., Art. 3, § 47); welfare (Alaska Const., Art. 1, § 5); public libraries (Michigan Const., Art. 8, § 9); highways (Louisiana Const., Art. 6, § 19; Minnesota Const., Article 16, §§ 1, 2; West Virginia Const., Good Roads Amendment of 1920).

ling state interest" test whenever it legislates except on unimportant matters.

A critic who is surely not unfriendly to the position argued for by plaintiffs in this case has undercut the argument that education is "fundamental," in a sense in which welfare and housing are not, and thus entitled to greater constitutional protection. He points out that poor children living in crowded housing neither sleep well nor have a place to do their homework and that often they come to school exhausted and fall asleep in class. He further observes that children from poor families go to school hungry and lack the physical stamina to concentrate on their work and participate in school activities. Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1389-1390 (1971). He cites others who have concluded that to improve educational achievement additional public monies should not be spent within the schools but should be allocated to improving the home and neighborhood environment. *Id.* at 1391 n. 226. See also *id.* at 1399. To the extent that this is true—and the force of the contention is obvious—the same arguments about education being "fundamental" that are here offered in support of more dollars for teachers in "poor" districts would have been available to change the results in *Dandridge, James, Lindsey,* and *Jefferson.*"

In an effort to avoid the force of the recent cases and establish a basis on which to find education "funda-

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"Judge Friendly links the welfare and the education cases together as examples of cases that "involve a confrontation of right against right, and require a decision that is essentially political. * * * In many of these cases, perhaps even in most, anyone who truly thinks that either the words or the spirit of the Fourteenth Amendment cast any real light is indulging in dangerous self-deception." Friendly, *The "Law of the Circuit" and All That,* 46 ST. JOHN'S L.REV. 406, 410 (1972).

mental," plaintiffs and those who support them endeavor to convert education into a First Amendment right (Appellees Brief 31-35; Flournoy Brief 2-4; Mayor and City Council of Baltimore Brief 22-25; Serranos Brief 32-42). There is a distinction that they have failed to grasp:

> **When the effect of state action is total deprivation of the service to the individual, whatever fundamental aspects of the service exist are necessarily eliminated. On the other hand, where a service is only impaired rather than totally withheld, it would seem necessary to determine whether or not the impairment does affect the basis of the fundamentality of the service.**

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 534 (1972). One can agree with Thomas Jefferson," as this Court did only last spring, that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system * * *," *Wisconsin* v. *Yoder,* 92 S.Ct. 1526, 1536 (1972), without having to agree that the failure of the state to provide more than the foundation program it now finances has any effect on the ability of students to participate in the political process or to enjoy a First Amendment "right to read." This Court's phrase, "some degree of education," was hardly inadvertent. Several pages later the Court said that there is nothing to indicate that Jefferson had in mind "compulsory education through any fixed age beyond a basic education." 92 S.Ct. at 1538. A basic education may well be necessary in order to enjoy First Amendment rights and thus be "fundamental" but the issue here is whether there is

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"Jefferson is relied on in Appellees Brief 32, Flournoy Brief 3, and NEA Brief 18-19.

a "fundamental" interest in a more expensive education than the basic education Texas already provides. The discussion of the First Amendment implications perceived in this case fails to meet that point."

4. Plaintiffs and their friends urge this Court to affirm the judgment below merely by finding the present Texas system of school finance invalid without indicating what plan of financing schools would satisfy the principle of "fiscal neutrality," should that now be found in the small print of the Equal Protection Clause. In large measure this is sound counsel. To the extent that there are a variety of plans that would meet that test, choice among them must surely be for the legislatures. But we earnestly submit that there is one choice among remedies that the Court must now consider because its resolution has a strong impact in determining whether Proposition I is, as the court below ruled, a constitutional requirement. This is whether "district power equalizing" would be a permissible response. The authors of Proposition I, not surprisingly, find the answer to the question of the constitutionality of "district power equalizing" to be "simple indeed" (Serranos Brief 55-56). Others of our opponents are noncommittal (Appellees Brief 50-51; NEA Brief 35-37; Mayor and City Council of Baltimore Brief 28). As we pointed out in our

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"The same analysis also disposes of the argument that education is "fundamental" because it is compulsory (Appellees Brief 29). That argument has been adequately dealt with in the literature. Brest, *Book Review*, 23 STAN.L.REV. 591, 605 (1971); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny*, 120 U.PA.L.REV. 504, 538-540 (1972). See particularly *id.* at 540:

> A child compelled to go to a poor school (rather than not compelled to go to school at all) is not hurt by that compulsion vis-à-vis another child compelled to go to a better school. He is only hurt by that compulsion if that poor school is worse than no school.

initial submission, Professor Coons and his associates seem to have persuaded no one except themselves that "district power equalizing" is constitutional (Appellants Brief 44-46).

If "district power equalizing" would itself be unconstitutional, because a child's "fundamental" interest in having as many dollars spent on him as on other children similarly situated elsewhere in the state would be dependent on a vote of his neighbors, then the only permissible solution would be determination on a statewide basis of the allocation of funds. The state could take objective factors into account (Appellants Brief 15) but local choice would be irrelevant and no district would be free to supplement the state subvention from its own resources. If this is what fiscal neutrality requires, local control and local choice would be gone, and, as amici have pointed out, "apparently everyone on both sides is in agreement" on the importance of local control and the undesirability of imposing on the states a constitutional straitjacket that would prevent localities from spending additional sums on education as they see fit (Serranos Brief 49). Because plantiffs concede that Texas has "a strong interest in decentralizing educational decision-making" (Appellees Brief 50), a principle that would destroy that interest can hardly be constitutionally required.

But there is equal difficulty for plaintiffs' position if it is assumed that "district power equalizing" would be permissible. The arguments now advanced in support of the proposition that fiscal neutrality in education is required by the Constitution would become greatly attenuated, if indeed they would not disappear altogether. The case would then be one to establish taxpayer equity rather than educational equity. Wise, *School Finance Equalization Lawsuits: A Model Leg-*

islative Response, 2 YALE REV. OF LAW & SOCIAL ACTION 123, 124 (1971); Schoettle, *The Equal Protection Clause in Public Education,* 71 COL.L.REV. 1355, 1405-1409 (1971).

> Viewed from the perspective of the child and his family's interest in equal education, the current system and district power equalizing suffer the same inadequacies. Neither is a wealth classification; they are both residence classifications in their actual effects. To the extent that expenditures are related to educational quality, the child receives a poorer education whether he lives in a poor district or simply one that undervalues education.
>
> Since the court's equal wealth standard allows for these continued educational disparities, the essential concern of *Serrano* is not the school child but the taxpayer. The California court has spawned a new, but perhaps logically inevitable corollary to Proposition I: The *economic burden* of public education may not be a function of wealth other than the wealth of the state as a whole. As such the principle of *Serrano* cannot realistically be limited to education, but applies to all burdens of taxation.

Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of* Serrano *v.* Priest *and Its Progeny,* 120 U.PA.L.REV. 504, 543-544 (1972)."

"A further difficulty with "district power equalizing" and an additional reason why it is unrealistic to regard it as an alternative to full state funding is that it assumes a uniform state assessment system, something that only a handful of states now have. There is no way of assuring that power has been equalized without an accurate and uniform measure of power. Thus, the states would be required either to destroy totally local fiscal control of school expenditures or to destroy totally local control of property tax assessments and collections. Either choice would be a deep intrusion into the traditional powers of local government.

This implication has not been lost on those who are pushing Proposition I. Mrs. Sarah Carey, Assistant Director of the Lawyers Committee for Civil Rights under Law, told the Sen-

If it is assumed that "district power equalizing" would pass constitutional muster, all of the reasons presented in an effort to show that there is a "fundamental" right to equal educational expenditures become irrelevant. The children in Edgewood would still have less spent on them than the children in Alamo Heights if this were the choice of the voters in the two districts. The only effect would be to ease the burden of increased expenditures on taxpayers in districts with assessed valuation below the state median. This is hardly consistent with the arguments that a "fundamental" right of children is at stake. "* * * [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943). The attempts to distinguish education from police, fire, sewers, and other services provided by local government would fail. Once the case is recognized as involving the economic burden on taxpayers, rather than supposed educational disadvantages to children, there would be no basis for limiting the principle to the school tax rather than extending it to all municipal taxes. Finally, the arguments that children deserve special protection from this Court because they do not have the right to vote and are not adequately represented by the vote of their parents (Appellees Brief 52-55; Serranos Brief 42-45) would also pass from the case, since the interest of the children would

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ate Committee on Equal Educational Opportunity that "a State that seeks to equalize local tax efforts, to require property rich communities to provide increased contributions to a state fund that will, in turn, be used to support property poor communities, will face a second set of equal protection challenges unless at the same time it equalizes the manner in which its property taxes are assessed and collected." *Hearings Before the Select Committee on Equal Education Opportunity, United States Senate,* 92d Cong., 1st Sess., at 6876 (1971).

still be dependent on the votes of their parents and neighbors.

This is the dilemma that confronted the framers of Proposition I. This is the reason that the courts that have accepted that proposition have murmured comfortingly that a wide variety of financing plans are consistent with it without undertaking to specify what they are (Appellants Brief 14). To accept "district power equalizing" is to make the case a taxpayers' case rather than a school children's case. To reject "district power equalizing" is to destroy the widely accepted interest in local choice and local control. Either horn of the dilemma makes Proposition I a very unappealing one for a court, and one very difficult to bring within the framework of past decisions. Yet there is no *tertium quid*. Either "district power equalizing" would be consistent with the Equal Protection Clause or it would not. A court cannot responsibly weigh the arguments for or against fiscal neutrality until it has faced up to this dilemma.

5. Plaintiffs make the quite surprising suggestion that the Texas system does not assure a minimum educational program (Appellants Brief 17-18, 47). Because of this, it is desirable to look more closely at what it is that Texas does.

The foundation program allots to each district one classroom teacher for every 25 students (with slightly different provisions for very small school districts). TEXAS EDUCATION CODE § 16.13 (App. 285). For every 20 classroom teachers, one special service teacher (librarian, school nurse, school physician, visiting teacher, or itinerant teacher) is provided. *Id.*, § 16.15 (App. 287). One principal is provided for the first 20 classroom teachers and an additional principal for each additional 30 classroom teachers, with further provision

for part-time principals. *Id.*, § 16.18 (App. 292). If the district has a four-year high school, it is allotted a superintendent. *Id.*, § 16.19 (App. 293). Supervisors and counselors are provided, based on the number of classroom teachers. *Id.*, § 16.17 (App. 291). Additional provision is made for vocational teachers, *id.*, § 16.14 (App. 286), and for professional personnel for special education of children who are physically handicapped, mentally retarded, emotionally disturbed, or who have a language or learning disability. *Id.*, § 16.16 (App. 288). The state specifies minimum qualifications and minimum salaries for teachers. *Id.*, §§ 16.301 *et seq.* (App. 294-305). It provides funds toward operating costs beyond salaries at the rate of $660 per teacher. *Id.*, § 16.45 (App. 306). It makes allotments for transportation of students. *Id.*, §§ 16.51 *et seq.* (App. 306-311). Eighty percent of the money to pay for these positions and services comes from the state but the allocation to districts is made on a formula that takes into account the ability of districts to pay their share. *Id.*, §§ 16.71 *et seq.* (App. 311-320). In some districts the state pays as much as 98% of the cost of the foundation program while in districts with greater ability to pay the state contribution is less than 80% (Graham Deposition 67).

The financing provisions are important—but they are far from all that Texas does to be sure that every child in the state receives an adequate education. The state provides free textbooks for all public school children. *Id.*, § 12.01. The state has created regional media and service centers to make available to schools in an area facilities and services that would be too costly for individual school districts to provide. *Id.*, §§ 11.32, 11.33. The state accredits public schools, *id.*, § 11.26(5), and has established elaborate regulations with which schools must comply to be accredited. TEXAS EDUCATION

AGENCY, PRINCIPLES AND STANDARDS FOR ACCREDITING ELEMENTARY AND SECONDARY SCHOOLS (Bulletin 560 Revised, 1970).

The state program is far from perfect, but it does guarantee an adequate education to every child. Indeed to describe it as a minimum program is to underestimate what Texas does." Beyond the state program, each district is left free to spend more money as its resources and its desires indicate. This, we submit, is a rational plan for financing public education and meets the test of the Fourteenth Amendment.

" I would like to say that I don't think it is a minimum program any longer. I think it is a basic program, because the Legislature in its wisdom has expanded vocational education tremendously. It has expanded special education tremendously, and it has provided other services in the Foundation Program that were not in the Foundation Program originally. So I personally now, while I certainly don't consider it the maximum program, I would prefer to call it a basic program.
Graham Deposition 15-16.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1972, I served three copies of the foregoing Reply Brief for Appellants upon the Appellees by depositing same in the United States Mail, postage prepaid, and addressed to Appellees' attorneys of record as follows: Mr. Arthur Gochman, 313 Travis Park West, 711 Navarro, San Antonio, Texas 78224, and Mr. Mario Obledo, 145 9th Street, San Francisco, California 94103.

PAT BAILEY

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* RODRIGUEZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 71-1332. Argued October 12, 1972—Decided March 21, 1973

The financing of public elementary and secondary schools in Texas is a product of state and local participation. Almost half of the revenues are derived from a largely state-funded program designed to provide a basic minimum educational offering in every school. Each district supplements state aid through an ad valorem tax on property within its jurisdiction. Appellees brought this class action on behalf of school children said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. The District Court, finding that wealth is a "suspect" classification and that education is a "fundamental" right, concluded that the system could be upheld only upon a showing, which appellants failed to make, that there was a compelling state interest for the system. The court also concluded that appellants failed even to demonstrate a reasonable or rational basis for the State's system. *Held:*

1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 14–40.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the

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1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 14-40.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the

relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect. Pp. 14–24.

(b) Nor does the Texas school-financing system impermissibly interfere with the exercise of a "fundamental" right or liberty. Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution. Even if some identifiable quantum of education is arguably entitled to constitutional protection to make meaningful the exercise of other constitutional rights, here there is no showing that the Texas system fails to provide the basic minimal skills necessary for that purpose. Pp. 25–35.

(c) Moreover, this is an inappropriate case in which to invoke strict scrutiny since it involves the most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review. Pp. 35–40.

2. The Texas system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. Pp. 40–49.

337 F. Supp. 280, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion. BRENNAN, J., filed a dissenting opinion. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants,
v.
Demetrio P. Rodriguez et al.

On Appeal from the United States District Court for the Western District of Texas.

[March 21, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner

[1] Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App., at 14.

[2] The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as party defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District has joined in the plaintiffs' challenge to the State's school finance system and has filed an *amicus curiae* brief in support of that position in this Court.

of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969.[3] In December 1971[4] the panel rendered its judgment in a *per curiam* opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[5] The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U. S. 966 (1972). For the reasons stated in this opinion we reverse the decision of the District Court.

I

The first Texas Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools.[6] Early in its history, Texas adopted a dual approach to the financing of its

[3] A three-judge court was properly convened and there are no questions as to the District Court's jurisdiction or the direct appealability of its judgment. 28 U. S. C. §§ 2281, 1253.

[4] The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system. 337 F. Supp. 280, 285 n. 11 (WD Tex. 1971).

[5] 337 F. Supp. 280. The District Court stayed its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program. The court, however, retained jurisdiction to fashion its own remedial order if the State failed to offer an acceptable plan. *Id.*, at 286.

[6] Tex. Const., Art. X, § 1 (1845):

"A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools."

Id., § 2:

"The Legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property . . . ."

schools, relying on mutual participation by the local school districts and the State. As early as 1883 the state constitution was amended to provide for the creation of local school districts empowered to levy *ad valorem* taxes with the consent of local taxpayers for the "erection of school buildings" and for the "further maintenance of public free schools." [7] Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.[8] The Permanent School Fund, established in 1854,[9] was endowed with millions of acres of public land set aside to assure a continued source of income for school support.[10] The Available School Fund, which received income from the Permanent School Fund as well as from a state *ad valorem* property tax and other designated taxes,[11] served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State.[12]

Until recent times Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State.[13] Sizable differences

[7] Tex. Const. 1876, Art. 7, § 3, as amended, Aug. 14, 1883.

[8] Tex. Const., Art. 7, §§ 3, 4, 5.

[9] Gammel's Laws of Texas, p. 1178. See Tex. Const., Art. 7, §§ 1, 2 (interpretive commentaries); I Report of Governor's Committee on Public School Education, The Challenge and the Chance 27 (1969) (hereinafter Governor's Committee Report).

[10] Tex. Const., Art. 7, § 5 (see also the interpretive commentary); V Governor's Committee Report, at 11–12.

[11] The various sources of revenue for the Available School Fund are cataloged in Texas State Bd. of Educ., Texas Statewide School Adequacy Survey 7–15 (1938).

[12] Tex. Const., Art. 7, § 3, as amended, Nov. 5, 1918 (see interpretive commentary).

[13] I Governor's Committee Report, at 35; Texas State Bd. of Educ., *supra*, n. 11, at 5–7; J. Coons, W. Clune, S. Sugarman,

in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced.[14] The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.[15]

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities.[16] Prior to 1939 the Available School Fund contributed money to every school district at a rate of $17.50 per school-age child.[17] Although the amount was increased several times in the early 1940's,[18] the Fund was providing only $46 per student by 1945.[19]

Private Wealth and Public Education 48–49 (1970); E. Cubberley, School Funds and Their Apportionment 21–27 (1905).

[14] By 1940 one-half of the State's population was clustered in its metropolitan centers. I Governor's Committee Report, at 35.

[15] Gilmer-Aiken Committee, To Have What We Must 13 (1948).

[16] R. Still, The Gilmer-Aiken Bills 11–12 (1950); Texas State Bd. of Educ., *supra*, n. 11.

[17] R. Still, *supra*, n. 16, at 12. It should be noted that during this period the median per pupil expenditure for all schools with an enrollment of more than 200 was approximately $50 per year. During this same period a survey conducted by the State Board of Education concluded that "in Texas the best educational advantages offered by the State at present may be had for the median cost of $52.67 per year per pupil in average daily attendance." Texas State Bd. of Educ., *supra*, n. 11, at 56.

[18] 1 General Laws of Texas, 46th Legis., Reg. Sess. 1939, at 274 ($22.50 per student); General & Spec. Laws of Texas, 48th Legis., Reg. Sess. 1943, c. 161, at 262 ($25.00 per student).

[19] General & Spec. Laws of Texas, 49th Legis., Reg. Sess. 1945, c. 53, at 75.

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education with an eye toward major reform. In 1947 an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aiken bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program.[20] Today this Program accounts for approximately half of the total educational expenditures in Texas.[21]

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible—as a unit—for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a com-

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[20] For a complete history of the adoption in Texas of a foundation program, see R. Stills, *supra*, n. 16. See also V Governor's Committee Report, at 14; Texas Research League, Public School Finance Problems in Texas 9 (Interim Report 1972).

[21] For the 1970–1971 school year this state aid program accounted for 48.0% of all public school funds. Local taxation contributed 41.1% and 10.9% was provided in federal funds. Texas Research League, *supra*, n. 20, at 9.

plicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State.[22] Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county.[23] The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

The design of this complex system was two-fold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children[24] but that would not by itself exhaust any district's resources.[25] Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education—from State as well as local sources—have increased steadily. Between 1949

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[22] V Governor's Committee Report, at 44–48.

[23] At present there are 1,161 school districts in Texas. Texas Research League, *supra*, n. 20, at 12.

[24] In 1948 the Gilmer-Aiken Committee found that some school districts were not levying any local tax to support education. Gilmer-Aiken Committee, *supra*, n. 15, at 16. The Texas State Board of Education Survey found that over 400 common and independent school districts were levying no local property tax in 1935–1936. Texas State Bd. of Educ., *supra* n. 11, at 39–42.

[25] Gilmer-Aiken Committee, *supra*, n. 15, at 15.

and 1967 expenditures increased by approximately 500%.[26] In the last decade alone the total public school budget rose from $750 million to $2.1 billion [27] and these increases have been reflected in consistently rising per pupil expenditures throughout the State.[28] Teacher salaries, by far the largest item in any school's budget, have increased dramatically—the state-supported minimum teacher salary has risen from $2,400 to $6,000 over the last 20 years.[29]

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960—the lowest in the metropolitan area—and the median family

[26] I Governor's Committee Report, at 51–53.

[27] Texas Research League, *supra*, n. 20, at 2.

[28] In the years between 1949 and 1967 the average per pupil expenditure for all current operating expenses increased from $206 to $493. In that same period capital expenditures increased from $44 to $102 per pupil. I Governor's Committee Report, at 53–54.

[29] III Governor's Committee Report, at 113–146; Berke, Carnevale, Morgan & White, The Texas School Finance Case: A Wrong in Search of a Remedy, 1 J. of L. & Educ. 659, 681–682 (1972).

income ($4,686) is also the lowest.[30] At an equalized tax rate of $1.05 per $100 of assessed property—the highest in the metropolitan area—the district contributed $26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248.[31] Federal funds added another $108 for a total of $356 per pupil.[32]

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly Anglo, having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds $49,000[33] and the median family

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[30] The family income figures are based on 1960 census statistics.

[31] The Available School Fund, technically, provides a second source of state money. That Fund has continued as in years past (see text accompanying nn. 16–19, *supra*) to distribute uniform per pupil grants to every district in the State. In 1968 this Fund allotted $98 per pupil. However, because the Available School Fund contribution is always subtracted from a district's entitlement under the Foundation Program, it plays no significant role in educational finance today.

[32] While federal assistance has an ameliorating effect on the difference in school budgets between wealthy and poor districts, the District Court rejected an argument made by the State in that court that it should consider the effect of the federal grant in assessing the discrimination claim. 337 F. Supp., at 284. The State has not renewed that contention here.

[33] A map of Bexar County included in the record shows that Edgewood and Alamo Heights are among the smallest districts in the county and are of approximately equal size. Yet, as the figures above indicate, Edgewood's student population is more than four times that of Alamo Heights. This factor obviously accounts for a significant percentage of the differences between the two districts in per pupil property values and expenditures. If Alamo Heights had as many students to educate as Edgewood does (22,000) its per

income is $8,001. In 1967–1968 the local tax rate of $.85 per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that Program, the district was able to supply $558 per student. Supplemented by a $36 per pupil grant from federal sources, Alamo Heights spent $594 per pupil.

Although the 1967–1968 school year figures provide the only complete statistical breakdown for each category of aid,[34] more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970–1971 school year, the Foundation School Program allotment for Edgewood was $356 per pupil, a 62% increase over the 1967–1968 school year. Indeed, state aid alone in 1970–1971 equaled Edgewood's entire 1967–1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting $491 per pupil in 1970–1971.[35] These recent figures

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pupil assessed property value would be approximately $11,100 rather than $49,000, and its per pupil expenditures would therefore have been considerably lower.

[34] The figures quoted above vary slightly from those utilized in the District Court opinion. 337 F. Supp., at 282. These trivial differences are apparently a product of that court's reliance on slightly different statistical data than we have relied upon.

[35] Although the Foundation Program has made significantly greater contributions to both school districts over the last several years, it is apparent that Alamo Heights has enjoyed a larger gain. The sizable difference between the Alamo Heights and Edgewood grants is due to the emphasis in the State's allocation formula on the guaranteed minimum salaries for teachers. Higher salaries are guaranteed to teachers having more years of experience and possessing more advanced degrees. Therefore, Alamo Heights, which has a greater percentage of experienced personnel with advanced degrees, receives more State support. In this regard the Texas Program is not unlike that presently in existence in a number of other States. C. Coons, W. Clune, S. Sugarman, *supra*, n. 13, at

also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately $100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only $8.46 per pupil, which is about 2.4% of its grant.[36] It does appear then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.[37]

Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State [38] still exist. And it was

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63–125. Because more dollars have been given to districts that already spend more per pupil, such Foundation formulas have been described as "anti-equalizing." *Ibid.* The formula, however, is anti-equalizing only if viewed in absolute terms. The percentage disparity between the two Texas districts is diminished substantially by State aid. Alamo Heights derived in 1967–1968 almost 13 times as much money from local taxes as Edgewood did. The State aid grants to each district in 1970–1971 lowered the ratio to approximately two to one, *i. e.*, Alamo Heights had a little more than twice as much money to spend per pupil from its combined State and local resources.

[36] Texas Research League, *supra*, n. 20, at 13.

[37] The Economic Index, which determines each county's share of the total Local Fund Assignment, is based on a complex formula conceived in 1949 when the Foundation Program was instituted. See text, at pp. 5–6 *supra*. It has frequently been suggested by Texas researchers that the formula be altered in several respects to provide a more accurate reflection of local taxpaying ability, especially of urban school districts. V Governor's Committee Report, at 48; Texas Research League, Texas Public School Finance: A Majority of Exceptions 31–32 (2d Interim Report 1972); Berke, Carnevale, Morgan & White, *supra*, n. 29, at 680–681.

[38] The District Court relied on the findings presented in an affidavit submitted by Professor Berke of Syracuse. His sampling of 110 Texas school districts demonstrated a direct correlation

these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school finance violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F. Supp., at 282. Finding that wealth is a "suspect" classification and that education is a "fundamental" interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling

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between the amount of a district's taxable property and its level of per pupil expenditure. But his study found only a partial correlation between a district's median family income and per pupil expenditures. The study also shows, in the relatively few districts at the extremes, an inverse correlation between percentage of minorities and expenditures.

Categorized by Equalized Property Values, Median Family Income, and State-Local Revenue

Market Value of Taxable Property Per Pupil	*Median Family Income From 1960*	*Per Cent Minority Pupils*	*State & Local Revenues Per Pupil*
Above $100,000 (10 Districts)	$5,900	8%	$815
$100,000–$50,000 (26 Districts)	$4,425	32%	$544
$50,000–$30,000 (30 Districts)	$4,900	23%	$483
$30,000–$10,000 (40 Districts)	$5,050	31%	$462
Below $10,000 (4 Districts)	$3,325	79%	$305

Although the correlations with respect to family income and race appear only to exist at the extremes, and although the affiant's methodology has been questioned (see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 523–525 nn. 67

state interest. *Id.*, at 282–284. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications." *Id.*, at 284.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights [39] or that involve suspect classifications.[40] If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision" and is "tailored" narrowly to serve legitimate objectives and that it has selected the "least drastic means" for effectuating its objectives,[41] the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection." [42] Apart from its concession that educational finance in

& 71 (1972)), insofar as any of these correlations is relevant to the constitutional thesis presented in this case we may accept its basic thrust. But see pp. 21–23 *infra*. For a defense of the reliability of the affidavit, see Berke, Carnevale, Morgan & White, *supra*, n. 29.

[39] *E. g., Police Dept. of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

[40] *E. g., Graham* v. *Richardson*, 403 U. S. 365 (1971); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964).

[41] See *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972), and the cases collected therein.

[42] Appellants' Brief, at 11.

Texas has "defects" [43] and "imperfections," [44] the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school finance. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes,[45] and on cases disapproving wealth restrictions on the right to vote.[46] Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then rea-

[43] *Ibid.*

[44] Tr. of Oral Arg., at 3; Appellants' Reply Brief, at 2.

[45] *E. g., Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963).

[46] *Harper* v. *Bd. of Elections*, 383 U. S. 663 (1966); *McDonald* v. *Bd. of Election Comm'rs*, 394 U. S. 802 (1969); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Goosby* v. *Osser*, — U. S. — (1973).

soned, based on decisions of this Court affirming the undeniable importance of education,[47] that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect classification nor the fundamental interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school financing laws in other States,[48] is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms,

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[47] See cases cited in text, at 25–26, *infra*.

[48] *Serrano* v. *Priest*, 96 Cal. Rptr. 601, 487 P. 2d 1241, 5 Cal. 3d 584 (1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Robinson* v. *Cahill*, 118 N. J. Super. 223, 287 A. 2d 187 (1972); *Milliken* v. *Green*, No. 54,809 (Mich. S. C., Jan. —, 1973).

and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school finance might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally "indigent," [49] or (2) against those who are relatively poorer than others,[50] or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer

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[49] In their complaint, appellees purported to represent a class composed of persons who are "poor" and who reside in school districts having a "low value of . . . property." Third Amended Complaint, App., at 15. Yet appellees have not defined the term "poor" with reference to any absolute or functional level of impecunity. See text, at 18–19, *infra*. See also Appellees' Brief, at 1, 3; Tr. of Oral Arg., at 20–21.

[50] Appellees' proof at trial focused on comparative differences in family incomes between residents of wealthy and poor districts. They endeavored, apparently, to show that there exists a direct correlation between personal family income and educational expenditures. See text, at 20–23, *infra*. The District Court may have been relying on this notion of relative discrimination based on family wealth. Citing appellees' statistical proof, the court emphasized that "those districts most rich in property also have the highest median family income . . . while the poor property districts are poor in income . . . ." 337 F. Supp., at 282.

school districts.[51] Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect.

The precedents of this Court provide the proper starting point. The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and its progeny,[52] the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And, the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some

[51] At oral argument and in their brief, appellees suggest that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Appellees' Brief, at 43–44; Tr. of Oral Arg., at 20–21. There are indications in the District Court opinion that it adopted this theory of district discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appellees' class as being composed of "all . . . children throughout Texas who live in school districts with low property valuations." 337 F. Supp., at 281.

[52] *Mayer* v. *City of Chicago*, 404 U. S. 189 (1971); *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969); *Gardner* v. *California*, 393 U. S. 367 (1969); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Erskine* v. *Washington Prison Board*, 357 U. S. 214 (1958).

"adequate substitute" for a full stenographic transcript. *Britt* v. *North Carolina*, 404 U. S. 226, 228 (1971); *Gardner* v. *California*, 393 U. S. 367 (1969); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Erskine* v. *Washington Prison Board*, 357 U. S. 214 (1958).

Likewise, in *Douglas* v. *California*, 372 U. S. 353 (1963), a decision establishing an indigent defendant's right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are, relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

Williams v. *Illinois*, 399 U. S. 235 (1970), and *Tate* v. *Short*, 401 U. S. 395 (1971), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in *Bullock* v. *Carter*, 405 U. S. 134 (1972), the Court invalidated the Texas filing fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars

and, in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided "no reasonable alternative means of access to the ballot" (*Id.*, at 149), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school finance system—discrimination against a class of definably "poor" persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts . . . . Thus, the major factual assumption of *Serrano*—that the educational finance system discriminates against the 'poor'—is simply false in Connecticut." [53] Defining "poor" families as those below the Bureau of the Census "poverty level," [54] the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts.[55]

[53] Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L. J. 1303, 1328–1329 (1972).

[54] *Id.*, at 1324 and n. 102.

[55] *Id.*, at 1328.

Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it,[56] a sufficient answer to appellees' argument is that at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages.[57] Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public school education, and by assuring teachers, books, transportation and operating funds,

[56] Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, *infra*.

[57] *E. g.*, *Bullock* v. *Carter*, 405 U. S. 134, 137, 149 (1972); *Mayer* v. *City of Chicago*, 404 U. S. 189, 194 (1971); *Draper* v. *Washington*, 372 U. S. 487, 495–496 (1963); *Douglas* v. *California*, 372 U. S. 353, 357 (1963).

the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'" [58] The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education." [59] No proof was offered at trial persuasively discrediting or refuting the State's assertion.

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible to identification in traditional terms.[60]

As suggested above, appellees and the District Court may have embraced a second or third approach, the

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[58] Gilmer-Aiken Committee, *supra*, n. 15, at 13. Indeed, even though local funding has long been a significant aspect of educational funding, the State has always viewed providing an acceptable education as one of its primary functions. See Texas State Bd. of Educ., *supra*, n. 11, at 1, 7.

[59] Appellants' Brief, at 35; Reply Brief, at 1.

[60] An educational finance system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative discrimination claim is an affidavit submitted by Professor Joele S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. 337 F. Supp., at 282, n. 3.

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees' comparative discrimination theory would still face serious unanswered questions, including whether a bare positive correlation or some higher degree of correlation [61] is necessary to provide a basis for concluding that the financing system is de-

[61] Also, it should be recognized that median income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families in any district.

signed to operate to the peculiar disadvantage of the comparatively poor,[62] and whether a class of this size and diversity could ever claim the special protection accorded "suspect" classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, set out in the margin,[63] show only that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts—96 districts comprising almost 90% of the sample—the correlation is inverted, *i. e.*, the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest median

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[62] Cf. *Jefferson* v. *Hackney*, 406 U. S. 535, 547–549 (1972); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1258–1259 (1970); Simon, The School Finance Decisions: Collective Bargaining and Future Finance Systems, 82 Yale L. J. 409, 439–440 (1973).

[63]

Market Value of Taxable Property Per Pupil	*Median Family Income in 1960*	*State & Local Expenditures Per Pupil*
Above $100,000 (10 districts)	$5,900	$815
$100,000–$50,000 (26 districts)	$4,425	$544
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$30,000–$10,000 (40 districts)	$5,050	$462
Below $10,000 (4 districts)	$3,325	$305

family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.[64]

This brings us, then, to the third way in which the classification scheme might be defined—*district* wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education.[65] Alternatively, as

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[64] Studies in other States have also questioned the existence of any dependable correlation between a district's wealth measured in terms of assessable property and the collective wealth of families residing in the district measured in terms of median family income. Ridenour & Ridenour, *Serrano* v. *Priest:* Wealth and Kansas School Finance, 20 Kan. L. 213, 225 (1972) ("it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil"); Davis, Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties, in The Challenge of Change in School Finance, 10th Nat'l Educational Assn. Conf. on School Finance 199 (1967). Note, 81 Yale L. J., *supra*, n. 53. See also Goldstein, *supra*, n. 38, at 522–527.

[65] Indeed, this is precisely how the plaintiffs in *Serrano* v. *Priest* defined the class they purported to represent: "Plaintiff children claim to represent a class consisting of all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California.'" 96 Cal. Rptr., at 604, 487 P. 2d, at 1244, 5 Cal. 3d, at 589. See also *Van Dusartz* v. *Hatfield*, 334 F. Supp., at 873.

> ment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Ibid.*

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (THE CHIEF JUSTICE), 237, 238–239 (MR. JUSTICE WHITE) (1972); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 230 (1963) (MR. JUSTICE BRENNAN); *McCollum* v. *Bd. of Education*, 333 U. S. 203, 212 (1948) (Mr. Justice Frankfurter); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Interstate Consolidated Street Ry.* v. *Massachusetts*, 207 U. S. 79 (1907).

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted.[69] But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro* v. *Thompson*, 394 U. S. 618, 655, 661 (1969). In his view, if the degree of judicial scrutiny of state legislation fluctuated de-

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[69] 337 F. Supp., at 283.

pending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" *Ibid.* We would indeed then be assuming a legislative role and one for which the Court lacks both authority and competence. But MR. JUSTICE STEWART'S response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental rights rationale employed in the Court's equal protection decisions:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

MR. JUSTICE STEWART'S statement serves to underline what the opinion of the Court in *Shapiro* makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained:

> "in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.*, at 634. (Emphasis from original.)

The right to interstate travel had long been recognized as a right of constitutional significance,[70] and the Court's

[70] *E. g., United States* v. *Guest*, 383 U. S. 745, 757–759 (1966); *Oregon* v. *Mitchell*, 400 U. S. 112, 229, 237–238 (1970) (opinion of JUSTICES BRENNAN, WHITE, and MARSHALL).

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decision therefore did not require an *ad hoc* determination as to the social or economic importance of that right."[71]

Lindsey v. *Normet*, 405 U. S. 56 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under "a more stringent standard than mere rationality." *Id.*, at 73. The tenants argued that the statutory limitations implicated "fundamental interests which are particularly important to the poor," such as the " 'need for decent shelter' " and the " 'right to retain peaceful possession of one's home.' " *Ibid.* MR. JUSTICE WHITE'S analysis, in his opinion for the Court, is instructive:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . . . *Absent constitutional mandate,* the assurance of adequate

[71] After *Dandridge* v. *Williams*, 397 U. S. 471 (1970), there could be no lingering question about the constitutional foundation for the Court's holding in *Shapiro*. In *Dandridge* the Court applied the rational basis test in reviewing Maryland's maximum family grant provision under its AFDC program. A federal district court held the provision unconstitutional, applying a stricter standard of review. In the course of reversing the lower court, the Court distinguished *Shapiro* properly on the ground that in that case "the Court found state interference with the constitutionally protected freedom of interstate travel." *Id.*, at 484 n. 16.

housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." *Id.*, at 74. (Emphasis supplied.)

Similarly, in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), the Court's explicit recognition of the fact that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings," *id.*, at 485,[72] provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also *Jefferson* v. *Hackney*, 406 U. S. 535 (1972); *Richardson* v. *Belcher*, 404 U. S. 78 (1971).

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972);[73]

[72] The Court refused to apply the strict scrutiny test despite its contemporaneous recognition in *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970) that "welfare provides the means to obtain essential food, clothing, housing, and medical care."

[73] In *Eisenstadt*, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed "to satisfy even the more lenient equal protection standard." *Id.*, at 447 n. 7. Nevertheless, in *dictum*, the Court

Dunn v. *Blumstein*, 405 U. S. 330 (1972);[74] *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972);[75] *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942).[76]

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.

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recited the correct form of equal protection analysis: "if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold* [v. *Connecticut*, 381 U. S. 479 (1965)], the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest." *Ibid.* (emphasis from original).

[74] *Dunn* fully canvasses this Court's voting rights cases and explains that "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.*, at 336 (emphasis supplied). The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 665 (1966), "the right to vote in state elections is nowhere expressly mentioned." See *Oregon* v. *Mitchell*, 400 U. S. 112, 135, 138–144 (MR. JUSTICE DOUGLAS), 229 241–242 (Opinion of JUSTICES BRENNAN, WHITE, and MARSHALL) (1970); *Bullock* v. *Carter*, 405 U. S. 134, 140–144 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621, 625–630 (1969); *Williams* v. *Rhodes*, 393 U. S. 23, 29, 30–31 (1968); *Reynolds* v. *Sims*, 377 U. S. 533, 554–562 (1964); *Gray* v. *Sanders*, 372 U. S. 368, 379–381 (1963).

[75] In *Mosley*, the Court struck down a Chicago antipicketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the Equal Protection Clause after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one "affecting First Amendment interests." *Id.*, at 101.

[76] *Skinner* applied the standard of close scrutiny to a state law permitting forced sterilization of "habitual criminals." Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. See *Roe* v. *Wade*, — U. S. —, — (1973).

As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information [77] becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote.[78] Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an in-

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[77] See, *e. g., Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389–390 (1969); *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301, 306–307 (1965).

[78] Since the right to vote, *per se*, is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. See n. 74, *supra*.

formed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted.[79] These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a

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[79] The States have often pursued their entirely legitimate interest in assuring "intelligent exercise of the franchise," *Katzenbach* v. *Morgan*, 384 U. S. 641, 655 (1966), through such devices as literacy tests and age restrictions on the right to vote. See *ibid.*; *Oregon* v. *Mitchell*, 400 U. S. 112 (1970). And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959), with *Oregon* v. *Mitchell*, 400 U. S., at 133 (Mr. Justice Black), 135, 144–147 (Mr. Justice Douglas), 152, 216–217 (Mr. Justice Harlan), 229, 231–236 (Opinion of Justices Brennan, White, and Marshall), 281, 282–284 (Mr. Justice Stewart), and *Gaston County* v. *United States*, 395 U. S. 285 (1969).

State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment.[80] If so appellees' thesis would cast serious doubt on the authority of *Dandridge* v. *Williams, supra,* and *Lindsey* v. *Normet, supra.*

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of

[80] See Schoettle, The Equal Protection Clause in Public Education, 71 Col. L. Rev. 1355, 1389–1390 (1971); Vieira, *supra,* n. 68, at 622–623; Comment, Tenant Interest Representation: Proposal for a National Tenants' Association, 47 Tex. L. Rev. 1160, 1172–1173 n. 61 (1969).

our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner* v. *Oklahoma, supra,* at 536; *Shapiro* v. *Thompson, supra,* at 634; *Dunn* v. *Blumstein, supra,* at 338–343. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. MR. JUSTICE BRENNAN, writing for the Court in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), expresses well the salient point: [81]

> "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated] . . . .
>
> "[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need decide only whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform

[81] *Katzenbach* v. *Morgan* involved a challenge by registered voters in New York City to a provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an "American-flag" school in that country even though the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

> measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . .'" *Id.*, at 656–657. (Emphasis from original.)

The Texas system of school finance is not unlike the federal legislation involved in *Katzenbach* in this regard. Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid—was implemented in an effort to *extend* public education and to improve its quality.[82] Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.[83]

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It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that

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[82] Cf. *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Hargrove* v. *Kirk*, 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U. S. 476 (1971).

[83] See *Schilb* v. *Kuebel*, 404 U. S. 357 (1971); *McDonald* v. *Bd. of Election Comm'rs*, 394 U. S. 802 (1969).

this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.[84] This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since

[84] See, *e. g.*, *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (1890); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 508-509 (1937); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959).

> the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . ." *Madden* v. *Kentucky*, 309 U. S. 83, 87–88 (1940).

See also *Lehnhausen* v. *Lake Shore Auto Parts Co.*, — U. S. — (1973); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940).

Thus we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.[55]

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[55] Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be statewide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See *Simon*, *supra*, n. 62. The authors of Private Wealth and Public Education, *supra*, n. 13, at 201–242, suggest an alternative scheme, known as "district power equalizing." In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge* v. *Williams*, 397 U. S., at 487. The very complexity of the problems of financing and managing a statewide public school system suggest that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson* v. *Hackney*, 406 U. S. 535, 546–547 (1972). On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the hottest sources of controversy concerns the extent to which there is a demonstrable correlation between

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dollars regardless of the district's tax base. To finance the subsidies to "poorer" districts, funds would be taken away from the "wealthier" districts that, because of their higher property values, collect more than the stated amount at any given rate. This is not the place to weigh the arguments for and against "district power equalizing," beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case. President's Comm'n on School Finance, Schools, People & Money 32–33 (1972); Bateman & Brown, Some Reflections on *Serrano* v. *Priest*, 49 J. Urban L. 701, 706–708 (1972); Brest, Book Review, 23 Stan. L. Rev. 591, 594–596 (1971); Goldstein, *supra*, n. 38, at 542–543; Wise, School Finance Equalization Lawsuits: A Model Legislative Response, 2 Yale Rev. of L. & Soc. Action 123, 125 (1971); Silard & White, Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause, 1970 Wis. L. Rev. 7, 29–30.

educational expenditures and the quality of education [86]—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education.[87] And the question regarding the most effective relationship beween state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be devined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions.

It must be remembered also that every claim arising under the Equal Protection Clause has implications for

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[86] The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. Jencks, Inequality (1972); C. Silberman, Crisis in the Classroom (1970); Office of Education, Equality of Educational Opportunity (1966) (The Coleman Report); On Equality of Educational Opportunity (1972) (Moynihan & Mosteller eds.); J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality (1969); President's Comm'n on School Finance, *supra*, n. 85; Swanson, The Cost-Quality Relationship, in The Challenge of Change in School Finance, 10th Nat'l Educational Assn. Conf. on School Finance 151 (1967).

[87] See the results of the Texas Governor's Committee's statewide survey on the goals of education in that State. I Governor's Committee Report, at 59–68. See also Goldstein, *supra*, n. 38, at 519–522; Schoettle, *supra*, n. 80; authorities cited in n. 86, *supra*.

the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent provisions under which this Court examines state action," [88] it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly upon the demands of the Equal Protection Clause.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school district. On a statewide average, a roughly comparable

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[88] *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 530, 532 (1959) (MR. JUSTICE BRENNAN, concurring); *Katzenbach* v. *Morgan*, 384 U. S. 641, 659, 661 (1966) (Mr. Justice Harlan, dissenting).

amount of funds is derived from each source.[89] The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher—compensated at the state-supported minimum salary—for every 25 students.[90] Each school district's other supportive personnel are provided for: one principal for every 30 teachers;[91] one "special service" teacher—librarian, nurse, doctor, etc.—for every 20 teachers;[92] superintendents, vocational instructors, counselors, and educators for exceptional children are also provided.[93] Additional funds are earmarked for current operating expenses, for student transportation,[94] and for free textbooks.[95]

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation[96] and for monitoring the statutory teacher qualification standards.[97] As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years,[98] the State's financial contribution to education is steadily increasing. None of Texas' school districts, how-

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[89] In 1970 Texas expended approximately 2.1 billion dollars for education and a little over one billion came from the Minimum Foundation Program. Texas Research League, *supra*, n. 20, at 2.

[90] Tex. Educ. Code § 16.13 (1972).

[91] *Id.*, § 16.18.

[92] *Id.*, § 16.15.

[93] *Id.*, §§ 16.16, 16.17, 16.19

[94] *Id.*, §§ 16.45, 16.51–16.63.

[95] *Id.*, §§ 12.01–12.04.

[96] *Id.*, § 11.26 (5).

[97] *Id.*, § 16.301 *et seq.*

[98] See *ante*, at 9–10.

ever, has been content to rely alone on funds from the Foundation Program.

By virtue of the obligation to fulfill its local Fund Assignment, every district must impose an *ad valorem* tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to assure that each district would have some ability to provide a more enriched educational program.[99] Every district supplements its foundation grant in this manner. In some districts the local property tax contribution is insubstantial, as in Edgewood where the supplement was only $26 per pupil in 1967. In other districts the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value.[100] The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.[101]

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[99] Gilmer-Aiken Committee, *supra*, n. 15, at 15.

[100] There is no uniform statewide assessment practice in Texas. Commercial property, for example, might be taxed at 30% of market value in one county and at 50% in another. V Governor's Committee Report, at 25–26; Berke, Carnevale, Morgan & White, *supra*, n. 29, at 666–667 n. 16.

[101] Texas Research League, *supra*, n. 20, at 18. Texas, in this regard, is not unlike most other States. One commentator has observed that "disparities in expenditures appear to be largely ex-

This, then, is the basic outline of the Texas finance structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even "to establish a reasonable basis" for a system that results in different levels of per pupil expenditure. 337 F. Supp., at 284. We disagree.

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plained by variations in teacher salaries." Simon, *supra*, n. 62, at 413.

As previously noted, text accompanying n. 86, *supra*, the extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education. While all would agree that there is a correlation up to the point of providing the recognized essentials in facilities and academic opportunities, the issues of greatest disagreement include the effect on the quality of education of pupil-teacher ratios and of higher teacher salary schedules. *E. g.*, Office of Education, *supra*, n. 86, at 316–319. The state funding in Texas is designed to assure, on the average, one teacher for every 25 students, which is considered to be a favorable ratio by most standards. Whether the minimum salary of $6,000 per year is sufficient in Texas to attract qualified teachers may be more debatable, depending in major part upon the location of the school district. But there appears to be little empirical data that supports the advantage of any particular pupil-teacher ratio or that documents the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction. An intractable problem in dealing with teachers' salaries is the absence, up to this time, of satisfactory techniques for judging their ability or performance. Relatively few school systems have merit plans of any kind, with the result that teachers' salaries are usually increased across the board in a way which tends to reward the least deserving on the same basis as the most deserving. Salaries are usually raised automatically on the basis of length of service and according to predetermined "steps," extending over 10-to-12 year periods.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State.[102] The power to tax local property for educational purposes has been recognized in Texas at least since 1883.[103] When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

The "foundation grant" theory upon which Texas educators based the Gilmer-Aiken bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig.[104] Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local

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[102] President's Comm'n on School Finance, *supra*, n. 85, at 9. Until recently, Hawaii was the only State that maintained a purely state-funded educational program. In 1968, however, that State amended its educational finance statute to permit counties to collect additional funds locally and spend those amounts on its schools. The rationale for that recent legislative choice is instructive on the question before the Court today:

"Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums provided for their people encourages the best features of democratic government." Haw. Sess. Laws, Act. 38, § 1 (1968).

[103] See text accompanying n. 7, *supra*.

[104] G. Strayer & R. Haig, The Financing of Education in the State of New York (1923). For a thorough analysis of the contribution of these reformers and of the prior and subsequent history of educational finance, see J. Coons, W. Clune & S. Sugarman, *supra*, n. 13, at 39–95.

participation. The Strayer-Haig thesis represented an accommodation between these two competing forces. As articulated by Professor Coleman:

> "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children." [105]

The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.*, at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.*, at 478.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity

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[105] J. Coons, W. Clune & S. Sugarman, *supra*, n. 13, Foreword by James S. Coleman, at vii.

it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory . . . and try novel social and economic experiments." [106] No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school finance system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others,[107]

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[106] *New State Ice Co.* v. *Leibmann*, 285 U. S. 262, 280, 311 (1932).

[107] MR. JUSTICE WHITE suggests in his dissent that the Texas system violates the Equal Protection Clause because the means it has selected to effectuate its interest in local autonomy fail to guarantee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a maximum rate of $1.50 per $100 valuation at which a local school district may tax for school maintenance. Tex. Educ. Code § 20.04 (d) (1972). The maintenance rate in Edgewood when this case was litigated in the District Court was $.55 per $100, barely one-third of the allowable rate. (The tax rate of $1.05 per $100, see p. 7, *supra*, is the equalized

the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandridge* v. *Williams*, 397 U. S., at 485. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools.[108] The people of Texas may be

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rate for maintenance and for the retirement of bonds.) Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented. Cf. *Hargrave* v. *Kirk*, 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U. S. 476 (1971).

[108] MR. JUSTICE MARSHALL states in his dissenting opinion that the State's asserted interest in local control is a "mere sham," *post*, p. 60, and that it has been offered not as a legitimate justification but "as an excuse . . . for interdistrict inequality." *Id.*, at 56. In addition to asserting that local control would be preserved and possibly better served under other systems—a consideration that we find irrelevant for purpose of deciding whether the system may be said to be supported by a legitimate and reasonable basis—the dissent suggests that Texas' lack of good faith may be demonstrated

justified in believing that other systems of school finance, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings

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by examining the extent to which the State already maintains considerable control. The State, we are told, regulates "the most minute details of local public education," *ibid.*, including textbook selection, teacher qualifications, and the length of the school day. This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decision-making and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the local school boards. Tex. Educ. Code §§ 17.01, 23.26 (1972). Among the innumerable specific powers of the local school authorities are the following: the power of eminent domain to acquire land for the construction of school facilities, *id.*, §§ 17.26, 23.26; the power to hire and terminate teachers and other personnel, *id.*, §§ 13.101–13.103; the power to designate conditions of teacher employment and to establish certain standards of educational policy, *id.*, § 13.901; the power to maintain order and discipline, *id.*, § 21.305, including the prerogative to suspend students for disciplinary reasons, *id.*, § 21.301; the power to decide whether to offer a kindergarten program, *id.*, §§ 21.131–21.135, or a vocational training program, *id.*, § 21.111, or a program of special education for the handicapped, *id.*, § 11.16; the power to control the assignment and transfer of students, *id.*, §§ 21.074–21.080; and the power to operate and maintain a school bus program, *id.*, § 16.52. See also *Pervis* v. *LaMarque Ind. School Dist.*, 328 F. Supp. 638, 642–643 (SD Tex. 1971), reversed, 466 F. 2d 1054 (CA5 1972); *Nichols* v. *Aldine Ind. School Dist.*, 356 S. W. 2d 182 (Tex. Civ. App. 1962). Local school boards also determine attendance zones, location of new schools, closing of old ones, school attendance hours (within limits), grading and promotion policies subject to general guidelines, recreational and athletic policies, and a myriad of other matters in the routine of school administration. It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools are made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.

at the state level will go increased control over local policies.[109]

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of

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[109] This theme—that greater state control over funding will lead to greater state power with respect to local educational programs and policies—is a recurrent one in the literature on financing public education. Professor Simon, in his thoughtful analysis of the political ramifications of this case, states that one of the most likely consequences of the District Court's decision would be an increase in the centralization of school finance and an increase in the extent of collective bargaining by teacher unions at the state level. He suggests that the subjects for bargaining may include many "non-salary" items, such as teaching loads, class size, curricular and program choices, questions of student discipline, and selection of administrative personnel—matters traditionally decided heretofore at the local level. Simon, *supra*, n. 62, at 434–436. See, *e. g.*, Coleman, The Struggle for Control of Education, in Education and Social Policy: Local Control of Education 64, 77–79 (Bowers, Housego & Dyke ed. 1970); J. Conant, The Child, The Parent, and The State 27 (1959) ("Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that schools are in fact local schools. . . ."); Howe, Anatomy of a Revolution, in Sat. Rev. 84, 88 (Nov. 20, 1971) ("It is an axiom of American politics that control and power follow money. . . ."); Hutchinson, State-Administered Locally-Shared Taxes 21 (1931) ("[S]tate administration of taxation is the first step toward state control of the functions supported by these taxes. . . ."). Irrespective of whether one regards such prospects as detrimental, or whether he agrees that the consequence is inevitable, it certainly cannot be doubted that there is a rational basis for this concern on the part of parents, educators, and legislators.

jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others.[110] Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

Moreover, if local taxation for local expenditure is an unconstitutional method of providing for education then it may be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denegration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school finance results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has per-

[110] This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of "territorial uniformity." *McGowan* v. *Maryland*, 366 U. S. 420, 427 (1961). See also *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 230–231 (1964); *Salsburg* v. *Maryland*, 346 U. S. 545 (1954). Cf. *Board of Education of Muskogee* v. *Oklahoma*, 409 F. 2d 665, 668 (CA10 1969).

sistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, *Lindsey* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78 (1911), it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 69–70 (1913). One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 49 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis* v. *Royster*, — U. S. —, — (1973). We hold that the Texas plan abundantly satisfies this standard.

IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, *Serrano* v. *Priest*, 96 Cal. Rptr.

601, 487 P. 2d 1241, 5 Cal. 3d 584 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefitted by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question [111]—these groups stand to

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[111] Any alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars such as income and sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education. See Senate Select

realize gains in terms of increased per pupil expenditures only if they reside in districts that presently spend at relatively low levels, *i. e.*, in those districts that would benefit from the redistribution of existing resources. Yet recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.[112] Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.[113] Additionally, several research projects have concluded that any financing alternative designed to achieve a greater equality of

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Comm. on Equal Educational Opportunity, 92d Cong., 2d Sess., Toward Equal Educational Opportunity 339–345 (Comm. Print 1972); Berke & Callahan, *Serrano* v. *Priest:* Milestone or Millstone for School Finance, 21 J. Pub. L. 23, 25–26 (1972); Simon, *supra*, n. 62, at 420–421. In Texas it has been calculated that $2.4 billion of additional school funds would be required to bring all schools in that State up to the present level of expenditure of all but the wealthiest districts—an amount more than double that currently being spent on education. Texas Research League, *supra*, n. 20, at 16–18. An *amicus curiae* brief filed on behalf of almost 30 States, focusing on these practical consequences, claims with some justification that "each of the undersigned states . . . would suffer severe financial stringency." Brief of *Amici Curiae* in Support of Appellants, at 2 (filed by Atty. Gen. of Md. et al.).

[112] See Note, *supra*, n. 53. See also authorities cited n. 114, *infra*.

[113] See Goldstein, *supra*, n. 38, at 526; C. Jencks, *supra*, n. 86, at 27; U. S. Comm'n on Civil Rights, Inequality in School Financing: The Role of the Law 37 (1972). J. Coons, W. Clune & S. Sugarman, *supra*, n. 13, at 356–357 n. 47, have noted that in California, for example, "59% of minority students live in districts above the median average valuation per pupil." In Bexar County by far the largest district—the San Antonio Independent School District—is above the local average in both the amount of taxable wealth per pupil and in median family income. Yet 72% of its students are Mexican-Americans. And, in 1967–1968 it spent only a very few dollars less per pupil than the North East and North Side Independent School Districts, which have only 7% and 18% Mexican-American enrollment respectively. Berke, Carnevale, Morgan & White, *supra*, n. 29, at 673.

expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers,[114] a result that would exacerbate rather than ameliorate existing conditions in those areas.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative new thinking as to public education, its methods and its funding, is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

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[114] See Senate Select Comm. on Equal Educational Opportunity, 92d Cong., 2d Sess., Issues in School Finance 129 (Comm. Print 1972) (monograph entitled "Inequities in School Finance" prepared by Professors Berke and Callahan); U. S. Office of Education, Finances of Large-City School Systems: A Comparative Analysis (1972) (HEW publication); U. S. Comm'n on Civil Rights, *supra*, n. 113, at 33–36; Simon, *supra*, n. 62, at 410–411, 418.

SUPREME COURT OF THE UNITED STATES

No. 71–1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[March 21, 1973]

MR. JUSTICE STEWART, concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.[1] It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.[2] The function of the Equal

[1] See New York Times, March 11, 1973, p. 1, col. 1.

[2] There is one notable exception to the above statement: It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533; *Kramer* v. *Union School District*, 395 U. S. 621; *Dunn* v. *Blumstein*, 405 U. S.

Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.

There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.[3] And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. See, *e. g.*, *Rinaldi* v. *Yeager*, 384 U. S. 305. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan* v. *Maryland*, 366 U. S. 420, 425–426, in the following words:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

330, 336. But there is no constitutional right to vote, as such. *Minor* v. *Happersett*, 88 U. S. 162. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary.

[3] But see *Bullock* v. *Carter*, 405 U. S. 134.

This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483; *McLaughlin* v. *Florida*, 379 U. S. 184. But there are other classifications that, at least in some settings, are also "suspect"—for example, those based upon national origin,[4] alienage,[5] indigency,[6] or illegitimacy.[7]

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more

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[4] See *Oyama* v. *California*, 332 U. S. 633, 644–646.

[5] See *Graham* v. *Richardson*, 403 U. S. 365, 372.

[6] See *Griffin* v. *Illinois*, 351 U. S. 12. "Indigency" means actual or functional indigency; it does not mean comparative poverty *vis-à vis* comparative affluence. See *James* v. *Valtierra*, 402 U. S. 137.

[7] See *Gomez* v. *Perez*, — U. S. —; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164.

basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle.[8]

In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause.[9] Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally "suspect" criteria. Third, the Texas system does not rest "on grounds wholly irrelevant to the achievement of the State's objective." Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in *McGowan* v. *Maryland, supra,* that the judgment of the District Court must be reversed.

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[8] See, *e. g., Mosley* v. *Police Dept. of City of Chicago,* 408 U. S. 92 (free speech); *Shapiro* v. *Thompson,* 394 U. S. 618 (freedom of interstate travel); *Williams* v. *Rhodes,* 393 U. S. 23 (freedom of association); *Skinner* v. *Oklahoma,* 316 U. S. 535 ("liberty" conditionally protected by Due Process Clause of Fourteenth Amendment).

[9] See *Katzenbach* v. *Morgan,* 384 U. S. 641, at 660 (Harlan, J., dissenting).

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San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[March 21, 1973]

MR. JUSTICE BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed "fundamental" for the purposes of equal protection analysis only if it is "explicitly or implicitly guaranteed by the Constitution." *Ante*, at —. As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that "fundamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." *Post*, at —.

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. See *post*, at —. This being so, any classification affecting education must

be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school financing scheme is constitutionally invalid.

SUPREME COURT OF THE UNITED STATES

No. 71–1332

San Antonio Independent School District et al., Appellants, *v.* Demetrio P. Rodriguez et al.	On Appeal from the United States District Court for the Western District of Texas.

[March 21, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per student.[2] The majority and the State concede, as they must, the existence of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school dis-

[1] The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, V. T. C. A., Education Code § 16.01 *et seq.* See also V. T. C. A., Education Code § 15.01 *et seq.*, and § 20.10 *et seq.*

[2] The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967–1968 school year. Because the various exhibits relied upon different attendance totals, the per pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

tricts desire and are able. . . . It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much." [3] The majority advances this rationalization: "While assuring a basic education for every child in the State, it permits and encourages a large measure of participation and control of each district's schools at the local level."

I cannot disagree with the proposition that local control and local decisionmaking play an important part in our democratic system of government. Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971). Much may be left to local option, and this case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extends a meaningful option to all local districts to increase their per-pupil expenditures and so to improve their children's education to the extent that increased funding will achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax. In these districts the Texas system utterly fails to extend a realistic choice to parents, because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

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[3] Brief for Appellants, pp. 11–13, 35.

Local school districts in Texas raise their portion of the Foundation School Program—the Local Fund Assignment—by levying ad valorem taxes on the property located within their boundaries. In addition, the districts are authorized, by the state constitution and by statute, to levy ad valorem property taxes in order to raise revenues to support educational spending over and above the expenditure of Foundation School Program funds.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is $49,078, in Edgewood $5,960. In a typical, relevant year, Alamo Heights had a maintenance tax rate of $1.20 and a debt service (bond) tax rate of 20¢ per $100 assessed evaluation, while Edgewood had a maintenance rate of 52¢ and a bond rate of 67¢. These rates, when applied to the respective tax bases, yielded Alamo Heights $1,433,473 in maintenance dollars and $236,074 in bond dollars, and Edgewood $223,034 in maintenance dollars and $279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood's base, realized almost six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond dollars by using a bond tax rate less than one-third of that used by Edgewood.

Nor is Edgewood's revenue raising potential only deficient when compared with Alamo Heights. North East District has taxable property with a per-pupil market value of approximately $31,000, but total taxable prop-

erty approximately four and one-half times that of Edgewood. Applying a maintenance rate of $1, North East yielded $2,818,148. Thus, because of its superior tax base, North East was able to apply a tax rate slightly less than twice that applied by Edgewood and yield more than 10 times the maintenance dollars. Similarly, North East, with a bond rate of 45¢, yielded $1,249,159—more than four times Edgewood's yield with two-thirds the rate.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and it's impact on Edgewood is undeniably serious. It is evident from statistics in the record that show that, applying an equalized tax rate of 85¢ per $100 assessed valuation, Alamo Heights was able to provide approximately $330 per pupil in local revenues over and above the Local Fund Assignment. In Edgewood, on the other hand, with an equalized tax rate of $1.05 per $100 of assessed valuation, $26 per pupil was raised beyond the Local Fund Assignment.[4] In Alamo Heights, total per-pupil revenues from local, state, and federal funds was $594 per pupil, in Edgewood $356.[5]

In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax

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[4] Variable assessment practices are also revealed in this record. Appellants do not, however, contend that this factor accounts, even to a small extent, for the interdistrict disparities.

[5] The per pupil funds received from state, federal, and other sources, while not precisely equal, do not account for the large differential and are not directly attacked in the present case.

at the rate of 68¢ per $100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of $5.76 per $100. But state law places a $1.50 per $100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. As the Court stated just last Term in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 172 (1972):

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey* v. *Doud*, 354 U. S. 457 (1957); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Gulf, Colorado & Santa Fé R. Co.* v. *Ellis*, 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886)."

Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treat-

ment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.[6] In my view, the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause.

This does not, of course, mean that local control may not be a legitimate goal of a school financing system. Nor does it mean that the State must guarantee each district an equal per-pupil revenue from the state school financing system. Nor does it mean, as the majority appears to believe, that, by affirming the decision below, this Court would be "interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions." On the contrary, it would merely mean that the State must fashion a financing scheme which provides a rational

[6] The State of Texas appears to concede that the choice of whether or not to go beyond the state-provided minimum "is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate and will provide their children with more expensive education." Brief for Appellants, p. 35. The State nevertheless insists that districts have a choice and that the people in each district have exercised that choice by providing some real property tax money over and above the minimum funds guaranteed by the State. Like the majority, however, the State fails to explain why the Equal Protection Clause is not violated or how its goal of providing local government with realistic choices as to how much money should be expended on education is implemented where the system makes it much more difficult for some than for others to provide additional educational funds and where as a practical and legal matter it is impossible for some districts to provide the educational budgets that other districts can make available from real property tax revenues.

basis for the maximization of local control, if local control is to remain a goal of the system, and not a scheme with "different treatment be[ing] accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed* v. *Reed*, 404 U. S. 71, 75–76 (1971).

Perhaps the majority believes that the major disparity in revenues provided and permitted by the Texas system is inconsequential. I cannot agree, however, that the difference of the magnitude appearing in this case can sensibly be ignored, particularly since the State itself considers it so important to provide opportunities to exceed the minimum state educational expenditures.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause. I need go no farther than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly unrepresented counties in the reapportionment cases. See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186, 204–208 (1962); *Gray* v. *Sanders*, 372 U. S. 368, 375 (1963); *Reynolds* v. *Sims*, 377 U. S. 533, 554–556 (1964). And in *Bullock* v. *Carter*, 405 U. S. 134 (1972), where a challenge to the Texas candidate filing fee on equal protection grounds was upheld, we noted that the victims of alleged discrimination wrought by the filing fee "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause," but concluded that "we would ignore reality were we not to recognize that

this system falls with unequal weight on voters, as well as candidates, according to economic status." *Id.*, at 144. Similarly, in the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school financing scheme with respect to their capability to supplement the Minimum Foundation School Program. At the very least, the law discriminates against those children and their parents who live in districts where the per-pupil tax base is sufficiently low to make impossible the provision of comparable school revenues by resort to the real property tax which is the only device the State extends for this purpose.

SUPREME COURT OF THE UNITED STATES

No. 71-1332

San Antonio Independent School District et al., Appellants, v. Demetrio P. Rodriguez et al. | On Appeal from the United States District Court for the Western District of Texas.

[March 21, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels edu-

[1] See *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Milliken* v. *Green*, — Mich. —, — N. W. 2d — (1972); *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971); *Robinson* v. *Cahill*, 118 N. J. Super. 223, 287 A. 2d 187, 119 N. J. Super. 40, 289 A. 2d 569 (1972); *Hollins* v. *Shofstall*, Civil No. C-253652 (Super. Ct. Maricopa Cty., Ariz., July 7, 1972). See also *Sweetwater County Planning Comm. for the Organization of School Districts* v. *Hinkle*, 491 P. 2d 1234 (Wyo. 1971), juris. relinquished, 493 P. 2d 1050 (Wyo. 1972).

cational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proven singularly unsuited to the task of providing a remedy for this discrimination.[2] I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954). I must therefore respectfully dissent.

I

The Court acknowledges that "substantial interdistrict disparities in school expenditures" exist in Texas, *ante*, at —, and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation," *ante*, at —. But instead of closely examining the seriousness of these

[2] The District Court in this case postponed decisions for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme. It was only after the legislature failed to act in its 1971 Regular Session that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision. See Texas Research League, Public School Finance Problems in Texas 13 (Interim Report 1972). The strong vested interest of property rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing. See N. Y. Times, Dec. 19, 1972, at 1, col. 1.

disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme, but rather whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on substantial numbers of the school-age children of the State of Texas.

A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government.[3] It is enlightening to consider these in order.

Under Texas law the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its

[3] Texas provides its school districts with extensive bonding authority to obtain capital both for the acquisition of school sites and "the construction and equipment of school buildings," Tex. Educ. Code Ann. § 20.01, and for the acquisition, construction, and maintenance of "gymnasia, stadia, and other recreational facilities," *id.*, §§ 20.21–20.22. While such private capital provides a fourth source of revenue, it is, of course, only temporary in nature since the principal and interest of all bonds must ultimately be paid out of the receipts of the local ad valorem property tax, see *id.*, §§ 20.01, 20.04, except to the extent that outside revenues derived from the operation of certain facilities, such as gymnasium, are employed to repay the bonds issued thereon, see *id.*, §§ 20.22, 20.25.

boundaries.[4] At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.[5]

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole.[6] Yet the amount of revenue that any particular Texas district can raise is dependent on two factors—its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying voters of the district.[7] But regardless of the enthusiasm of the local voters for public education, the second factor—the taxable property wealth of the district—necessarily restricts the district's ability to raise funds to support public education.[8] Thus, even

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[4] See Tex. Const., Art. 7, § 3; Tex. Educ. Code Ann. § 20.01–.02. As a part of the property tax scheme, bonding authority is conferred upon the local school districts, see n. 3, *supra*.

[5] See Tex. Educ. Code Ann. § 20.04.

[6] For the 1970–1971 school year, the precise figure was 41.1%. See Texas Research League, *supra*, n. 2, at 9.

[7] See Tex. Educ. Code Ann. § 20.04.

Theoretically, Texas law limits the tax rate for public school maintenance, see *id.*, § 20.02, to $1.50 per $100 valuation, see *id.*, § 20.04 (d). However, it does not appear that any Texas district presently taxes itself at the highest rate allowable, although some poor districts are approaching it, see App., at 174.

[8] Under Texas law local districts are allowed to employ differing bases of assessment—a fact that introduces a third variable into the local funding. See Tex. Educ. Code Ann. § 20.03. But neither party has suggested that this factor is responsible for the disparities in revenues available to the various districts. Consequently, I believe we must deal with this case on the assumption that differences in local methods of assessment do not meaningfully affect the revenue

though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property rich districts and to disfavor property poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts [9] for the 1967–1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than $100,000 in taxable property per pupil, raised through local effort an average of $610 per pupil, whereas the four poorest districts studied, each of which had less than $10,000 in taxable property per pupil, were able to raise only an average of $63 per pupil.[10] And, as the Court effectively recognizes, *ante*, at —, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.[11]

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raising power of local districts relative to one another. The Court apparently admits as much. See *ante*, at —. It should be noted, moreover, that the main set of data introduced before the District Court to establish the disparities at issue here was based upon "equalized taxable property" values which had been adjusted to correct for differing methods of assessment. See App. C to Affidavit of Professor Joel S. Berke.

[9] Texas has approximately 1,200 school districts.

[10] See App. I, *infra*.

[11] See *id*. Indeed, appellants acknowledge that the relevant data from Professor Berke's affidavit show "a very positive correlation, 0.973, between market value of taxable property per pupil and

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It is clear, moreover, that the disparity of per pupil revenues cannot be dismissed as the result of lack of local effort—that is, lower tax rates—by property poor districts. To the contrary, the data presented below indictate that the poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates.[12] Yet, despite the apparent *extra* effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce $585 per pupil with an equalized tax rate of 31¢ on $100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70¢ on $100 of equalized valuation, were able to produce only $60 per pupil.[13] Without more, this state imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby

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state and local revenues per pupil." Reply Brief for Appellants 6, n. 9.

While the Court takes issue with much of Professor Berke's data and conclusions, *ante*, at —, nn. 38 and —, I do not understand its criticisms to run to the basic finding of a correlation between taxable district property per pupil and local revenues per pupil. The critique of Professor Berke's methodology upon which the Court relies, see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest*, and its Progeny, 120 U. Pa. L. Rev. 504, 523–525, nn. 67 and 71 (1972), is directed only at the suggested correlations between family income and taxable district wealth and between race and taxable district wealth. Obviously, the appellants do not question the relationship in Texas between taxable district wealth and per pupil expenditures; and there is no basis for the Court to do so, whatever the criticisms that may be leveled at other aspects of Professor Berke's study, see *infra*, n. 56.

[12] See App. II, *infra*.

[13] See *Ibid.*

of Texas school children, in terms of the amount of funds available for public education.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas.[14] Furthermore, while these federal funds are not distributed in Texas solely on a per pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and school children of the local property tax element of the state financing scheme.[15]

State funds provide the remaining some 50% of the monies spent on public education in Texas.[16] Technically, they are distributed under two programs. The first is the Available School Fund, for which provision is made in the Texas Constitution.[17] The Available School Fund is comprised of revenues obtained from a number of sources, including receipts from the state ad valorem property tax, one-fourth of all monies collected by the occupation taxes, annual contributions by the legislature from general revenues, and the revenues de-

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[14] For the 1970–1971 school year, the precise figure was 10.9%. See Texas Research League, *supra*, n. 2, at 9.

[15] Appellants made such a contention before the District Court but apparently have abandoned it in this Court. Indeed, data introduced in the District Court simply belies the argument that federal funds have a significant equalizing effect. See App. I, *infra*. And, as the District Court observed, it does not follow that remedial action by the Federal Government would excuse any unconstitutional discrimination effected by the state financing scheme. 337 F. Supp. 280, 284.

[16] For the 1970–1971 school year, the precise figure was 48%. See Texas Research League, *supra*, n. 2, at 9.

[17] See Tex. Const., Art. 7, § 5 (Supp. 1972). See also Tex. Educ. Code Ann. § 15.01 (b).

rived from the Permanent School Fund.[18] For the 1970–1971 school year the Available School Fund contained $296,000,000. The Texas Constitution requires that this money be distributed annually on a per capita basis [19] to the local school districts. Obviously such a flat grant could not alone eradicate the funding differentials attributable to the local property tax. Moreover, today the Available School Fund is in reality simply one facet of the second state financing program, the Minimum Foundation School Program,[20] since each district's annual share of the Fund is deducted from the sum to which the district is entitled under the Foundation Program.[21]

The Minimum Foundation School Program provides funds for three specific purposes: professional salaries, current operating expenses, and transportation expenses.[22] The State pays, on an overall basis, for approximately 80% of the cost of the Program; the remaining 20% is distributed among the local school districts under the Local Fund Assignment.[23] Each district's share of the Local Fund Assignment is determined by a complex "economic index" which is designed to allocate a larger share of the costs to property rich districts than to prop-

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[18] See Tex. Educ. Code Ann. § 15.01 (b).

The Permanent School Fund is, in essence, a public trust initially endowed with vast quantities of public land, the sale of which has provided an enormous copus that in turn produces substantial annual revenues which are devoted exclusively to public education. See Tex. Const., Art. 7, § 5 (Supp. 1972). See also V Report of the Governor's Committee on Public School Education, The Challenge and the Chance 11 (1969) (hereinafter Texas Governor's Committee Report).

[19] This is determined from the average daily attendance within each district for the preceding year. Tex. Educ. Code Ann. § 15.01 (c).

[20] See *id.*, §§ 16.01–16.975.

[21] See *id.*, §§ 16.71 (2), 16.79.

[22] See *id.*, §§ 16.301–16.316, 16.45, 16.51–16.63.

[23] See *id.*, §§ 16.72–16.73, 16.76–16.77.

erty poor districts.[24] Each district pays its share with revenues derived from local property taxation.

The stated purpose of the Minimum Foundation School Program is to provide certain basic funding for each local Texas school district.[25] At the same time, the Program was apparently intended to improve, to some degree, the financial position of property poor districts relative to property rich districts, since—through the use of the economic index—an effort is made to charge a disproportionate share of the costs of the Program to rich districts.[26] It bears noting, however, that substantial criticism has been leveled at the practical effectiveness of the economic index system of local cost allocation.[27] In theory, the index is designed to ascertain the relative ability of each district to contribute to the Local Fund Assignment from local property taxes. Yet the index is not developed simply on the basis of each district's taxable wealth. It also takes into account the district's relative income from manufacturing, mining, and agriculture, its payrolls, and its scholastic population.[28] It is difficult to discern precisely how these latter factors are predictive of a district's relative ability to raise

[24] See *id.*, §§ 16.74–16.76. The formula for calculating each district's share is described in V Texas Governor's Committee Report 44–48.

[25] See Tex. Educ. Code Ann. § 16.01.

[26] See V Texas Governor's Committee Report 40–41.

[27] See *id.*, at 45–67; Texas Research League, Texas Public Schools Under the Minimum Foundation Program—An Evaluation: 1949–1954, 67–68 (1954).

[28] Technically, the economic index involves a two step calculation. First, on the basis of the factors mentioned above, each Texas county's share of the Local Fund Assignment is determined. Then each county's share is divided among its school districts on the basis of their relative shares of the county's assessable wealth. See Tex. Educ. Code Ann. §§ 16.74–16.76; V Texas Governor's Committee Report 43–44; Texas Research League, Texas Public School Finance: A Majority of Exceptions 6–8 (2d Interim Report 1972).

revenues through local property taxes. Thus, in 1966, one of the consultants who originally participated in the development of the Texas economic index adopted in 1949 told the Governor's Committee on Public Education:[29] "The Economic Index approach to evaluating local ability offers a little better measure than sheer chance but not much."

Moreover, even putting aside these criticisms of the economic index as a device for achieving meaningful district wealth equalization through cost allocation, poor districts still do not necessarily *receive* more state aid than property rich districts. For the standards which currently determine the amount received from the Foundation Program by any particular district[30] favor property rich districts.[31] Thus, focusing on the same Edge-

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[29] V Texas Governor's Committee Report 48, quoting statement of Dr. Edgar Morphet.

[30] The extraordinarily complex standards are summarized in V Texas Governor's Committee Report 41–43.

[31] The key element of the Minimum Foundation School Program is the provision of funds for professional salaries—more particularly, for teacher salaries. The Program provides each district with funds to pay its professional payroll as determined by certain state standards. See Tex. Educ. Code Ann. §§ 16.301–16.316. If the district fails to pay its teachers at the levels determined by the state standards it receives nothing from the Program. See *id.*, § 16.301 (c). At the same time, districts are free to pay their teachers salaries in excess of the level set by the state standards, using local revenues—that is, property tax revenue—to make up the difference, see *id.*, § 16.301 (a).

The state salary standards focus upon two factors: the educational level and the experience of the district's teachers. See *id.*, §§ 16.301–16.316. The higher these two factors are, the more funds the district will receive from the Foundation Program for professional salaries.

It should be apparent that the net effect of this scheme is to provide more assistance to property rich districts than to property poor ones. For rich districts are able to pay their teachers, out of

wood Independent and Alamo Heights School Districts which the majority uses for purposes of illustration, we find that in 1967–1968 property rich Alamo Heights,[32] which raised $333 per pupil on an equalized tax rate of 85¢ per $100 valuation, received $225 per pupil from the Foundation Program, while property poor Edgewood,[33] which raised only $26 per pupil with an equalized tax rate of $1.05 per $100 valuation, received only $222 per pupil from the Foundation Program.[34] And, more recent data, which indicates that for the 1970–1971 school year Alamo Heights received $491 per pupil from the Program

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local funds, salary increments above the state minimum levels. Thus, the rich districts are able to attract the teachers with the best education and the most experience. To complete the circle, this then means, given the state standards, that the rich districts receive more from the Foundation Program for professional salaries than do poor districts. A portion of Professor Berke's study vividly illustrates the impact of the State's standards on districts of varying wealth. See App. III, *infra*.

[32] In 1967–1968, Alamo Heights School District had $49,478 in taxable property per pupil. See Berke Affidavit, Table VII, App., at 216.

[33] In 1967–1968, Edgewood Independent School District had $5,960 in taxable property per pupil. *Ibid.*

[34] I fail to understand the relevance for this case of the Court's suggestion that if Alamo Heights School District, which is approximately the same physical size as Edgewood Independent School District but which has only one-fourth as many students, had the same number of students as Edgewood, the former's per pupil expenditure would be considerably closer to the latter's. *Ante*, at —, n. 33. Obviously, this is true, but it does not alter the simple fact that Edgewood *does* have four times as many students but not four times as much taxable property wealth. From the perspective of Edgewood's school children then—the perspective that ultimately counts here—Edgewood is clearly a much poorer district than Alamo Heights. The question here is not whether districts have equal taxable property wealth in absolute terms, but whether districts have differing taxable wealth given their respective school-age populations.

while Edgewood received only $356 per pupil, hardly suggests that the wealth gap between the districts is being narrowed by the State Program. To the contrary, whereas in 1967–1968 Alamo Heights received only $3 per pupil or about 1%, more than Edgewood in state aid, by 1970–1971 the gap had widened to a difference of $135 per pupil, or about 38%.[35] It was data of this character that prompted the District Court to observe that "the current [state aid] system tends to subsidize the rich at the expense of the poor, rather than the other way around."[36] 337 F. Supp. 280, 282. And even the appellants go no further here than to venture that the Minimum Foundation School Program has "a mildly equalizing effect."[37]

Despite these facts, the majority continually emphasizes how much state aid has, in recent years, been given to property poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property rich Texas school

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[35] In the face of these gross disparities in treatment which experience with the Texas financing scheme has revealed, I cannot accept the Court's suggestion that we are dealing here with a remedial scheme to which we should accord substantial deference because of its accomplishments rather than criticize it for its failures. *Ante*, at —. Moreover, Texas' financing scheme is hardly remedial legislation of the type for which we have previously shown substantial tolerance. Such legislation may in fact extend the vote to "persons who otherwise would be denied it by state law," *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966), or it may eliminate the evils of the private bail bondsman, *Schilb* v. *Kuebel*, 404 U. S. 357 (1971). But those are instances in which a legislative body has sought to remedy problems for which it cannot be said to have been directly responsible. By contrast, public education is the function of the State in Texas, and the responsibility for any defect in the financing scheme must ultimately rest with the State. It is the State's own scheme which has caused the funding problem, and, thus viewed, that scheme can hardly be deemed remedial.

[36] Compare App. I, *infra*.

[37] Brief for Appellants 3.

districts on top of their already substantial local property tax revenues.[38] Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.[39]

B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district

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[38] Thus, in 1967–1968, Edgewood had a total of $248 per pupil in state and local funds compared with a total of $558 per pupil for Alamo Heights. See Berke Affidavit, Table X, App., at 219. For 1970–1971, the respective totals were $418 and $913. See Texas Research League, *supra*, n. 2, at 14.

[39] Not only does the local property tax provide approximately 40% of the funds expended on public education, but it is the *only* source of funds for such essential aspects of educational financing as the payment of school bonds, see n. 3, *supra*, and the payment of the district's share of the Local Fund Assignment, as well as for nearly all expenditures above the minimums established by the Foundation Program.

is determined by money—beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas school children as a result of the widely varying per pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. Authorities concerned with educational quality no doubt disagree as to the significance of variations in per pupil spending.[40] Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement.[41] We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe

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[40] Compare, *e. g.*, J. Coleman, et al., Equality of Educational Opportunity 290–330 (1966), Jencks, The Coleman Report and the Conventional Wisdom, in On Equality of Educational Opportunity 69, 91–104 (F. Mosteller & D. Moynihan, ed. 1972), with *e. g.*, J. Gutherie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality 79–90 (1971); Kiesling, Measuring a Local Government Service: A Study of School Districts in New York State, 49 Rev. Econ. & Statistics 356 (1967).

[41] Compare Berke Deposition, at 10 ("[D]ollar expenditures are probably the best way of measuring the quality of education afforded students . . . ."), with Graham Deposition, at 3 ("[I]t is not just necessarily the money, no. It is how wisely you spend it."). It warrants noting that even appellants' witness, Mr. Graham, qualified the importance of money only by the requirement of wise expenditure. Quite obviously, a district which is property poor is powerless to match the education provided by a property rich district assuming each district allocates its funds with equal wisdom.

the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gianes* v. *Canada*, 305 U. S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

Hence, even before this Court recognized its duty to tear down the barriers of state enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may make for discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state enforced segregation of a law school, the Court in *Sweatt* v. *Painter*, 339 U. S. 629, 633–634 (1950), stated:

> "[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [white only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

See also *McLaurin* v. *Oklahoma State Regents for Higher Education*, 339 U. S. 637 (1950). Likewise it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, who have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.[42]

The consequences, in terms of objective educational inputs, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968–1969, 100% of the teachers in the property rich Alamo Heights School District had college degrees.[43] By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District.[44] Also, in 1968–1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits.[45] This is undoubtedly a reflection of the

[42] See Brief of, *inter alia*, San Marino Unified School District Beverly Hills Unified School District as *amici curiae*; Brief of, *inter alia*, Bloomfield Hills, Michigan, School District; Dearborn City, Michigan, School District; Grosse Pointe, Michigan, Public School System as *amici curiae*.

[43] Answers to Plaintiffs' Interrogatories, App., at 115.

[44] *Ibid.* Moreover, during the same period, 37.17% of the teachers in Alamo Heights had advanced degrees, while only 14.98% of Edgewood's faculty had such degrees. See *id.*, at 116.

[45] *Id.*, at 117.

fact that Edgewood's teacher salary scale was approximately 80% of Alamo Heights'.[46] And, not surprisingly, the teacher-student ratio varies significantly between the two districts.[47] In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state created discrimination in the provision of public education. Cf. *Gaston County* v. *United States*, 395 U. S. 285, 293–294 (1969).

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education must fall upon the appellants. Cf. *Hobson* v. *Hansen*, 327 F. Supp. 844, 860–861 (DC 1971). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state created discrimination between the school children of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program

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[46] *Id.*, at 118.

[47] In the 1967–1968 school year, Edgewood had 22,862 students and 864 teachers, a ratio of 26.5 to 1. See *id.*, at 110, 114. In Alamo Heights, for the same school year, there were 5,432 students and 265 teachers for a ratio of 20.5 to 1. See *ibid.*

effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the Texas financing scheme. Appellants assert that, despite its imperfections, the Program "does guarantee an adequate education to every child." [48] The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program "was designed to provide an adequate minimum educational offering in every school in the State," *ante*, at ——, and that the Program "assur[es] a basic education for every child," *ante*, at ——. But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property poor districts *vis-à-vis* property rich districts—in terms of educational funds—to eliminate any claim of interdistrict discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, *e. g.*, *Mayer* v. *City of Chicago*, 404 U. S. 189, 194–195 (1971); *Draper* v *Washington*, 372 U. S. 487, 495–496 (1963); *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501 (1931). But as has already been seen, we are hardly presented here with some *de minimis* claim of discrimination resulting from the "play" necessary in any functioning system; to the contrary, it

[48] Reply Brief for Appellants 17. See also, *id.*, at 5, 15–16.

is clear that the Foundation Program utterly fails to ameliorate the seriously discriminatory effects of the local property tax.[49]

Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough."[50] The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940).

See also *Douglas* v. *California*, 372 U. S. 353, 357 (1963); *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948).

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[49] Indeed, even apart from the differential treatment inherent in the local property tax, the significant interdistrict disparities in state aid received under the Minimum Foundation School Program would seem to raise substantial equal protection questions.

[50] I find particularly strong intimations of such a view in the majority's efforts to denigrate the constitutional significance of children in property poor districts "receiving a poorer quality education than that available to children in districts having more assessable wealth" with the assertion "that at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Ante*, at —. The Court, to be sure, restricts its remark to "wealth" discrimination. But the logical basis for such a restriction is not explained by the Court, nor is it otherwise apparent, see pp. ——— and n. 77, *infra*.

But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920).

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants informs us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see *ante*, at —, — n. 86 and n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to devine that the particular levels of funding provided by the Program assure an adequate educational opportunity—much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Mini-

mum Foundation School Program cannot obscure the constitutional implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax—particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now much touted "adequacy" of the education guaranteed by the Foundation Program.[51]

In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the school children of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.[52]

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[51] See Answers to Interrogatories by Dr. Joel S. Berke, Ans. 17, p. 9; Ans. 48–51, pp. 22–24; Ans. 88–89, pp. 41–42; Deposition of Dr. Daniel C. Morgan, Jr., 52–55; Affidavit of Dr. Daniel C. Morgan, Jr., App., at 242–243.

[52] It is true that in two previous cases this Court has summarily affirmed district court dismissals of constitutional attacks upon other state educational financing schemes. See *McInnis* v. *Shapiro*, 293 F. Supp. 327 (ND Ill. 1968), aff'd *per curiam sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322 (1969); *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (WD Va. 1969), aff'd *per curiam*, 397 U. S. 44 (1970). But those decisions cannot be considered dispositive of this action, for the thrust of those suits differed materially from that of the present case. In *McInnis*, the plaintiffs asserted that "*only* a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment." 293 F. Supp., at 331. The District Court concluded that "(1) the Fourteenth Amendment does not require public school expenditures [to] be made only on the basis of pupils' educational

C

Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws "distinction between groups of citizens depending upon the wealth of the district in which they live" and thus creates a disadvantaged class composed of persons living in property poor districts. See 337 F. Supp., at 282. See also *id.*, at 281. In light of the data introduced before the District Court, the conclusion that the school children of property poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, they point out, the States have broad discretion

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needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable." *Id.*, at 329. The *Burress* District Court dismissed that suit essentially in reliance on *McInnis* which it found to be 'scarcely distinguishable." 310 F. Supp., at 574. This suit involves no effort to obtain an allocation of school funds that considers only educational need. The District Court ruled only that the State must remedy the discrimination in the distribution of taxable local district wealth which has heretofore prevented many districts from truly exercising local fiscal control. Furthermore, the limited holding of the District Court presents none of the problems of judicial management which would exist if the federal courts were to attempt to ensure the distribution of educational funds solely on the basis of educational need, see *infra*, pp. ———.

in drawing reasonable distinctions between their political subdivisions. See *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 231 (1964); *McGowan* v. *Maryland*, 366 U. S. 420, 427 (1961); *Salsburg* v. *Maryland*, 346 U. S. 545, 550–554 (1954).

But this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. See *Gordon* v. *Lance*, 403 U. S. 1, 4 (1971); *Reynolds* v. *Sims*, 377 U. S. 533, 565–566 (1964); *Gray* v. *Sanders* 372 U. S. 368, 379 (1963). Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution.[53] Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas school children with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between school age children on the basis of the amount of taxable property located within their local districts.

In my Brother STEWART's view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the "kind of objectively identifiable classes" that he evidently per-

[53] Tex. Const., Art. 7, § 1.

ceives to be necessary for a claim to be "cognizable under the Equal Protection Clause," *ante*, at —. He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any case, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who comprise the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination—whatever the standard of equal protection analysis employed.[54] This is clear from our decision only last Term in *Bullock* v. *Carter*, 405 U. S. 134 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing fee system tended "to deny some voters the opportunity to vote for the candidate of their choosing; at the same time it gives the affluent power to place on the ballot their own names or the names of persons they favor." *Id.*, at 144. The

[54] Problems of remedy may be another matter. If provision of the relief sought in a particular case required identification of each member of the affected class, as in the case of monetary relief, the need for clarity in defining the class is apparent. But this involves the procedural problems inherent in class action litigation, not the character of the elements essential to equal protection analysis. We are concerned here only with the latter. Moreover, it is evident that in cases such as this provision of appropriate relief, which takes the injunctive form, is not a serious problem since it is enough to direct the action of appropriate officials. Cf. *Potts* v. *Flak*, 313 F. 2d 284, 288–290 (CA5 1963).

Court also recognized that "[t]his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . . ." *Ibid.* Nevertheless, it concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status." *Ibid.* The nature of the classification in *Bullock* was clear, although the precise membership of the disadvantaged class was not. This was enough in *Bullock* for purposes of equal protection analysis. It is enough here.

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. See *ante*, at —. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulatable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property poor districts, suggesting discrimination on the basis of both personal wealth and race. See 337 F. Supp., at 282 and n. 3. The Court goes to great lengths to discredit the data upon which the District Court relied and thereby its conclusion that poor people live in property poor dis-

tricts.[55] Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below,[56] I have no need to join issue on these factual disputes.

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[55] I assume the Court would launch the same criticism against the validity of the finding of a correlation between poor districts and racial minorities.

[56] The Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that "there is reason to believe that the poorest families are not necessarily clustered in the poorest districts" in Texas. *Ante*, at —. In support of its conclusion the Court offers absolutely no data—which it cannot on this record—concerning the distribution of poor people in Texas to refute the data introduced below by appellees; it relies instead on a recent law review note concerned solely with the State of Connecticut, Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L. J. 1303 (1972). Common sense suggests that the basis for drawing a demographic conclusion with respect to a geographically large, urban-rural, industrial-agricultural State such as Texas from a geographically small, densely populated, highly industrialized State such as Connecticut is doubtful at best.

Furthermore, the article upon which the Court relies to discredit the statistical procedures employed by Professor Berke to establish the correlation between poor people and poor districts, see n. 11, *supra*, based its criticism primarily on the fact that only four of the 110 districts studied were in the lowest of the five categories, which were determined by relative taxable property per pupil, and most districts clustered in the middle three groups. See Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano* v. *Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 524 n. 67 (1972). See also *ante*, at —. But the Court fails to note that the four poorest districts in the sample had over 50,000 students which constituted 10% of the students in the entire sample. It appears, moreover, that even when the richest and the poorest categories are enlarged to include in each category 20% of the students in the sample, the correlation between district and individual wealth holds true. See Brief for the Governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan as *amici curiae* 17 n. 21.

Finally, it cannot be ignored that the data introduced by appellees went unchallenged in the District Court. The majority's willingness

I believe it is sufficient that the overarching form of discrimination in this case is between the school children of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity.[57] This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an "artificially defined level" of district wealth. *Ante*, at —. But such is clearly not the case, for this is the

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to permit appellants to litigate the correctness of that data for the first time before this tribunal—where effective response by appellees is impossible—is both unfair and judicially unsound.

[57] Third Amended Complaint, App., at 23. Consistent with this theory, appellees purported to represent, among others, a class composed of "all . . . school children in independent school districts . . . who . . . have been deprived of the equal protection of the law under the Fourteenth Amendment with regard to public school education because of the low value of the property lying within the independent school districts in which they reside." *Id.*, at 15.

definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas school children or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed.[58] Whether this discrimination, against the school children of property poor districts, inherent in the Texas financing scheme is violative of the Equal Protection Clause is the question to which we must now turn.

II

In striking down the Texas financing scheme because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a "compelling state interest" in order to withstand constitutional scrutiny. The basis for this determination was two-fold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a "fundamental interest," namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a "fundamental interest," see, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 336–342 (1972); *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969), or is based on a distinction of a suspect character, see, *e. g., Graham* v. *Richardson,* 403 U. S. 365, 372

[58] The degree of judicial scrutiny that this particular classification demands is a distinct issue which I consider in Part II, C, *infra.*

(1971); *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964), must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S., at 342–343; *Shapiro* v. *Thompson*, 394 U. S., at 634. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961); *Morey* v. *Doud*, 354 U. S. 457, 465–466 (1957); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911). By so doing the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case.

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See *Dandridge* v. *Williams*, 397 U. S. 471, 519–521 (1970) (dissenting opinion); *Richardson* v. *Belcher*, 404 U. S. 78, 90 (1971) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing

discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S., at 520–521 (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972). Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying the Document: the right "was conceived from the beginning to be a concomitant of the stronger Union the Constitution created." *United States* v. *Guest*, 383 U. S. 745, 758 (1966). See also *Crandall* v. *Nevada*, 6 Wall. 35, 48 (1867). Consequently, the Court

has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a *compelling* governmental interest." *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969). But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is *always* determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution," *ante*, at —.[59]

I would like to know where the Constitution guarantees the right to procreate, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942), or the right to vote in state elections, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964), or the right to an appeal from a criminal conviction, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck* v. *Bell*, 274 U. S. 200 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S., at 541, the Court, without impugning the continuing validity of *Buck* v. *Bell*, held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence

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[59] Indeed, the Court's theory would render the established concept of fundamental interests in the context of equal protection analysis superfluous, for the substantive constitutional right itself requires that this Court strictly scrutinize any asserted state interest for restricting or denying access to any particular guaranteed right, see, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Cox* v. *Louisiana*, 379 U. S. 536, 545–551 (1965).

and survival of the race." Recently, in *Roe* v. *Wade*, — U. S. —, — (1973), the importance of procreation has indeed been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck* v. *Bell*. See *Roe* v. *Wade*, — U. S., at —.

Similarly, the right to vote in state elections has been recognized as a "fundamental political right," because the Court concluded very early that it is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964). For this reason, "this Court has made clear that a citizen has a *constitutionally protected right* to participate in elections *on an equal basis with other citizens in the jurisdiction.*" *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972) (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.[60] See *Oregon* v. *Mitchell*,

[60] It is interesting that in its effort to reconcile the state voting rights cases with its theory of fundamentality the majority can muster nothing more than the contention that "[t]he constitutional underpinnings of the *right to equal treatment in the voting process* can no longer be doubted . . . ." *Ante*, at — n. 74 (emphasis added). If, by this, the Court intends to recognize a substantive constitutional "right to equal treatment in the voting process" independent of the Equal Protection Clause, the source of such a right is certainly a mystery to me.

400 U. S. 112 (1970); *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 626–629 (1969); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 665 (1966).

Finally, it is likewise "true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin* v. *Illinois*, 351 U. S., at 18. Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny. See, *e. g.*, *Griffin* v. *Illinois*, *supra*; *Douglas* v. *California*, 372 U. S. 353 (1963).[61]

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws," *ante*, at —. Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guar-

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[61] It is true that *Griffin* and *Douglas* also involved discrimination against indigents, that is, wealth discrimination. But, as the majority points out, *ante*, at — n. 67, the Court has never deemed wealth discrimination alone to be sufficient to require strict judicial scrutiny; rather, such review of wealth classifications has been applied only where the discrimination affects an important individual interest, see, *e. g.*, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Thus, I believe *Griffin* and *Douglas* can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.

anteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights [62] implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in *Eisenstadt* v. *Baird*, 405

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[62] See, *e. g.*, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) (right to jury trial); *Washington* v. *Texas*, 388 U. S. 14 (1967) (right to compulsory process); *Pointer* v. *Texas*, 380 U. S. 400 (1965) (right to confront one's accusers).

U. S. 438 (1972). In *Baird*, the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. *Id.*, at 446–447. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552, 557 (1947). And this lenient standard is further weighted in the State's favor by the fact that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived [by the Court] to justify it." *McGowan* v. *Maryland*, 366 U. S., at 426. But in *Baird* the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute—*e. g.*, deterrence of premarital sexual activity; regulation of the dissemination of potentially dangerous articles—the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. See 405 U. S., at 449–454. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. See, *e. g.*, *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Kotch* v. *Board of River Port Pilot Commissioners*, *supra*. Yet I think the Court's action was entirely appropriate for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. See 405 U. S., at 453–

454; *id.*, at 463–464 (WHITE, J., concurring). See also *Roe* v. *Wade*, — U. S., at —.

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race,[63] nationality,[64] or alienage[65] is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. See *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971); cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153 n. 4 (1938). Moreover, race, nationality, or alienage is " 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States*, 320 U. S. 81, 100." *McLaughlin* v. *Florida*, 379 U. S., at 192. Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce—or at least not to the same degree—in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

In *James* v. *Strange*, 407 U. S. 128 (1972), the Court held unconstitutional a state statute which provided for

[63] See, *e. g.*, *McLaughlin* v. *Florida*, 379 U. S., at 191–192; *Loving* v. *Virginia*, 388 U. S. 1, 9 (1967).

[64] See *Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944).

[65] See *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971).

recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the state and civil judgment debtors, since criminal debtors were denied various protective exemptions afforded civil judgment debtors.[44] The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be " 'some rationality' " in the line drawn between the different types of debtors. *Id.*, at 140. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus the Court recognized "that state recoupment statutes may be token legitimate state interests" in recovering expenses and discouraging fraud. Nevertheless, MR. JUSTICE POWELL, speaking for the Court, concluded that

> "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." *Id.*, at 141–142.

The Court, in short, clearly did not consider the problems of fraud and collection that the state legislature might have concluded were peculiar to indigent criminal defendants to be either sufficiently important or at least

[44] The Court noted that the challenged "provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade." 407 U. S., at 135.

sufficiently substantiated to justify denial of the protective exemptions afforded to all civil judgment debtors, to a class composed exclusively of indigent criminal debtors.

Similarly, in *Reed* v. *Reed*, 404 U. S. 71 (1971), the Court, in striking down a state statute which gave men preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protection review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore "a rational relationship to a state objective," which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. *Id.*, at 76. Accepting such a purpose, the Idaho Supreme Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of estate. 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970). This Court, however, concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ." *Id.*, at 76. This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex.

James and *Reed* can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state dis-

crimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the spectre of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

In *Weber*, the Court struck down a portion of a state workmen's compensation statute that relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legitimate children of the deceased. The Court acknowledged the true nature of its inquiry in cases such as these: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.*, at 173. Embarking upon a determination of the relative substantiality of the State's justifications for the classification, the Court rejected the contention that the classifications reflected what might be presumed to have been the deceased's preference of beneficiaries as "not compelling . . . where dependency on the deceased is a prerequisite to anyone's recovery . . . ." *Ibid.* Likewise, it deemed the relationship between the State's interest in encouraging legitimate family relationships and the burden placed on the illegitimates too tenuous to permit the classification to stand. *Ibid.* A clear insight into the basis of the Court's action is provided by its conclusion:

> "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no

> child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth." 406 U. S., at 175–176 (footnote omitted).

Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained for such interests are generally far removed from constitutional guarantees. Moreover, "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge* v. *Williams*, 397 U. S., at 520 (dissenting opinon). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "super-

legislature." *Ante*, at —. I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that Document. In truth, the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.[67] Opinions such as those in *Reed* and *James* seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in

[67] See generally Gunther, The Supreme Court, 1971 Term: Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

to evaluate, to gain new maturity and understanding . . . ." Thus, we have not casually described the classroom as the " 'marketplace of ideas.' " *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." [70]

Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *School District of Abington Township* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes.[71]

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[70] Developments in the LAW—Equal Protection, 82 Harv. L. Rev. 1065, 1129 (1969).

[71] The President's Commission on School Finance, Schools, People, and Money: the Need for Educational Reform 11 (1972), concluded that "[l]iterally, we cannot survive as a nation or as individuals without [education]." It further observed that:

"[I]n a democratic society, public understanding of public issues is necessary for public support. Schools generally include in their courses of instruction a wide variety of subjects related to the history, structure and principles of American government at all levels. In so doing, schools provide students with a background of knowledge

Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.[72] A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of First Amendment freedoms." *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968). But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is "preservative of other basic civil and political rights," *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964). Data from the Presidential Election of 1968 clearly demonstrates a direct relationship between participation in the electoral proc-

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which is deemed an absolute necessity for responsible citizenship." *Id.*, at 13–14.

[72] See J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality 103–105 (1971); R. Hess & J. Torney, The Development of Political Attitudes in Children 217–218 (1967); Campbell, The Passive Citizen, VI Acta Sociologica, Nos. 1–2, 9, 20–21 (1962).

That education is the dominant factor in influencing political participation and awareness is sufficient, I believe, to dispose of the Court's suggestion that, in all events, there is no indication that Texas is not providing all of its children with a sufficient education to enjoy the right of free speech and to participate fully in the political process. *Ante*, at —. There is, in short, no limit on the amount of free speech or political participation that the Constitution guarantees. Moreover, it should be obvious that the political process, like most other aspects of social intercourse, is to some degree competitive. It is thus of little benefit to an individual from a property poor district to have "enough" education if those around him have more than "enough." Cf. *Sweatt* v. *Painter*, 339 U. S. 629, 633–634 (1950).

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ess and level of educational attainment;[73] and, as this Court recognized in *Gaston* v. *United States*, 395 U. S. 285, 296 (1969), the quality of education offered may influence a child's decision to "enter or remain in school." In is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.[74]

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[73] See United States Department of Commerce, Bureau of the Census, Voting and Registration in the Election of November 1968, Current Population Reports, Series P-20, No. 192, Table 4, p. 17 (1968). See also Levin, The Costs to the Nation of Inadequate Education, Committee Print of the Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., pp. 46–47 (1972).

[74] I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case than our prior decisions concerning discrimination affecting public welfare, see, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471 (1970), or housing, see, *e. g.*, *Lindsey* v. *Normet*, 405 U. S. 56 (1972). There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. *Ante*, at —. But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States, see n. 65, *supra*. Education, in terms of constitutional values, is much more analogous in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has "never presumed to possess either the ability or the authority to guarantee the citizenry the most *effective* speech or the most *informed* electoral choice." *Ante*, at —. This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most *effective* speech nor of the most *informed* vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown* v. *Board of Education*, 347 U. S., at 493: The opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts [75]—a con-

[75] The majority's reliance on this Court's traditional deference to legislative bodies in matters of taxation falls wide of the mark in the context of this particular case. See *ante*, at —. The decisions on which the Court relies were simply taxpayer suits challenging the constitutionality of a tax burden in the face of exemptions or differential taxation afforded to others. See, *e. g.*, *Allied*

clusion which is only strengthened when we consider the character of the classification in this case.

C

The District Court found that in discriminating between Texas school children on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. See, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12 (1951); *Douglas* v. *California*, 372 U. S. 353 (1963); *McDonald* v. *Board of Election Commissioners of Chicago*, 394 U. S. 802, 807 (1969). The

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Stores of Ohio, Inc. v. *Bowers*, 358 U. S. 522 (1959); *Madden* v. *Kentucky*, 309 U. S. 83 (1940); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (1890). There is no question that from the perspective of the taxpayer, the Equal Protection Clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of an excise upon various products." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S., at 526-527. But in this case we are presented with a claim of discrimination of an entirely different nature—a claim that the revenue producing mechanism directly discriminates against the interests of some of the intended beneficiaries; and in contrast to the taxpayer suits, the interest adversely affected is of substantial constitutional and societal importance. Hence, a different standard of equal protection review than has been employed in the taxpayer suits is appropriate here. It is true that affirmance of the District Court decision would to some extent intrude upon the State's taxing power insofar as it would be necessary for the State to at least equalize taxable district wealth. But contray to the suggestions of the majority, affirmance would not impose a strait jacket upon the revenue raising powers of the State, and would certainly not spell the end of the local property tax. See *infra*, pp. ———.

majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Ante*, at —. I cannot agree. The Court's distinctions may be sufficient to explain the decisions in *Williams* v. *Illinois*, 399 U. S. 235 (1970); *Tate* v. *Short*, 401 U. S. 395 (1971); and even *Bullock* v. *Carter*, 405 U. S. 134 (1972). But they are not in fact consistent with the decisions in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), or *Griffin* v. *Illinois*, *supra*, or *Douglas* v. *California*, *supra*.

In *Harper*, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of $1.50, payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest—the exercise of the state franchise. In addition, though, the Court emphasized that "[l]ines drawn on the basis of wealth or property . . . are traditionally disfavored." *Id.*, at 668. Under the first part of the theory announced by the majority the disadvantaged class in *Harper*, in terms of a wealth analysis, should have consisted only of those too poor to afford the $1.50 necessary to vote. But the *Harper* Court did not see it that way. In its view, the Equal Protection Clause "bars a system which excludes [from the franchise] those unable to pay a fee to vote or who *fail to pay*." *Ibid.* (Emphasis added.) So far as the Court was concerned, the "degree of discrimination

[was] irrelevant." *Ibid.* Thus, the Court struck down the poll tax *in toto;* it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

Similarly, *Griffin* and *Douglas* refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes *Griffin* as a case concerned simply with the denial of a transcript or an adequate substitute therefor, and *Douglas* as involving the denial of counsel. But in both cases the question was in fact whether "a State that [grants] *appellate review* can do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin* v. *Illinois,* 351 U. S., at 18 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies "the poor an adequate *appellate review* accorded to all who have money enough to pay the costs in advance," *ibid.* (emphasis added), and that "the type of an *appeal* a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel," *Douglas* v. *California,* 372 U. S., at 355–356 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich.[76] It was on these terms that the

[76] This does not mean that the Court has demanded precise equality in the treatment of the indigent and the person of means in the criminal process. We have never suggested, for instance, that the Equal Protection Clause requires the best lawyer money can buy for the indigent. We are hardly equipped with the objective standards which such a judgment would require. But we have pursued the goal of substantial equality of treatment in the face of clear dis-

Court found a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the basis of wealth which do not amount to outright denial of the affected right or interest.[77]

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on

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parities in the nature of the appellate process afforded rich versus poor. See, *e. g.*, *Draper* v. *Washington*, 372 U. S. 487, 495–496 (1963); cf. *Coppedge* v. *United States*, 369 U. S. 438, 447 (1962).

[77] Even putting aside its misreading of *Griffin* and *Douglas*, the Court fails to offer any reasoned constitutional basis for restricting cases involving wealth discrimination to instances in which there is an absolute deprivation of the interest affected. As I have already discussed, see *supra*, p. —, the Equal Protection Clause guarantees equality of treatment of those persons who are similarly situated; it does not merely bar some form of excessive discrimination between such persons. Outside the context of wealth discrimination, the Court's reapportionment decisions clearly indicate that relative discrimination is within the purview of the Equal Protection Clause. Thus, in *Reynolds* v. *Sims*, 377 U. S. 533, 562–563 (1964), the Court recognized:

"It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. . . . Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"

See also *Gray* v. *Sanders*, 372 U. S. 368, 380–381 (1963). The Court gives no explanation why a case involving wealth discrimination should be treated any differently.

the basis of personal wealth.[78] Here, by contrast, the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

As the Court points out, *ante*, at —, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth "rigorous judicial scrutiny" of allegedly discriminatory state action. Compare, *e. g.*, *Harper* v. *Virginia Board of Elections*, *supra*, with, *e. g.*, *James* v. *Valtierra*, 402 U. S. 137 (1971). That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups.[79] Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups.[80] But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps, most importantly, though, personal wealth may not

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[78] But cf. *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972), where prospective candidates' threatened exclusion from a primary ballot because of their inability to pay a filing fee was seen as discrimination against both the impecunious candidates and the "less affluent segment of the community" that supported such candidates but was also too poor as a group to contribute enough for the filing fees.

[79] But cf. M. Harrington, The Other America 13–17 (Penguin ed. 1963).

[80] See E. Banfield, The Unheavenly City 63, 75–76 (1970); cf. R. Lynd & H. Lynd, Middletown in Transition 450 (1937).

necessarily share the general irrelevance as basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a legally disadvantaged group,[81] it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See *Harper* v. *Virginia Board of Elections, supra.*

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests,[82] it bears no relationship whatsoever to the interest of Texas school children in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control,[83] it represents in fact a more serious basis of

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[81] Cf. *City of New York* v. *Miln*, 11 Pet. 102, 142 (1837).

[82] Theoretically, at least, it may provide a mechanism for implementing Texas' asserted interest in local educational control, see *infra*, pp. ———.

[83] True, a family may move to escape a property poor school district, assuming it has the means to do so. But such a view would itself raise a serious constitutional question concerning an impermissible burdening of the right to travel, or, more precisely, the con-

of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling," *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), or a "substantial" or "important" *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972), state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose,[57] but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the state's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258, 265 (1967); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. See *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972); *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 627 (1969). It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act and the care with which we scrutinize the effectiveness of the means which the State selects also must reflect the consti-

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[57] Cf., *e. g.*, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582 (1961); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948).

tutional importance of the interest affected and the invidiousness of the particular classification. Here both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests for their classification based on wealth, they fail even to establish a reasonable basis for these classifications." 337 F. Supp., at 284. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. We observed only last Term that "[d]irect control over decisions vitally affecting the education of one's children is a need strongly felt in our society." *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 469 (1972). See also *id.*, at 477–478 (BURGER, C. J., dissenting). The State's interest in local educational control—which certainly includes questions of educational funding—has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's school children. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For on this record, it is apparent that the State's purported concern with local control is offered

primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas statewide laws regulate in fact the most minute details of local public education. For example, the State prescribes required courses.[88] All textbooks must be submitted for state approval,[89] and only approved textbooks may be used.[90] The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification.[91] The State has even legislated on the length of the school day.[92] Texas' own courts have said:

> "As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas." *Treadway* v. *Whitney Independent School District*, 205 S. W. 2d 97, 99 (Tex. Civil App. 1947).

See also *El Dorado Independent School District* v. *Tisdale*, 3 S. W. 2d 420, 422 (Tex. Comm. App. 1928).

Moreover, even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest—as the Court does, *ante*, at ———that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local

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[88] Tex. Educ. Code Ann. §§ 21.101–21.117. Criminal penalties are provided for failure to teach certain required courses. *Id.*, §§ 4.15–4.16.

[89] *Id.*, §§ 12.11–12.35.

[90] *Id.*, § 12.62.

[91] *Id.*, §§ 13.031–13.046.

[92] *Id.*, § 21.004.

fiscal control. If Texas had a system truly dedicated to local fiscal control one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property poor districts making the highest tax effort obtained the lowest per pupil yield.[93] The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967–1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only $26 per pupil through its local property tax, whereas Alamo Heights was able to raise $333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice—with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs—under which a property poor district such as Edgewood is forced to

[93] See App. II, *infra*.

labor.[84] In fact, because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same yield as Alamo Heights.[85] At present, then, local control is a myth for many of the local school districts in Texas. As one district court has observed, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)," *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870, 876 (Minn. 1971).

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control.[86] At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well, if not better, than the present scheme without the current impairment of the educational oppor-

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[84] See Affidavit of Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District, App., at 234–238.

[85] See App. IV, *infra*.

[86] My Brother WHITE, in concluding that the Texas financing scheme runs afoul of the Equal Protection Clause, likewise finds on analysis that the means chosen by Texas—local property taxation dependent upon local taxable wealth—is completely unsuited in its present form to the achievement of the asserted goal of providing local fiscal control. Although my Brother WHITE purports to reach this result by application of that lenient standard of mere rationality traditionally applied in the context of commercial interests, it seems to be that the care with which he scrutinizes the practical effectiveness of the present local property tax as a device for affording local fiscal control reflects the application of a more stringent standard of review, a standard which at the least is influenced by the constitutional significance of the process of public education.

tunity of vast numbers of Texas school children.[97] I see no need, however, to explore the practical or constitutional merits of those suggested alternatives at this time, for whatever their positive or negative features, experience with the present financing scheme impugns any suggestion that it constitutes a serious effort to provide local fiscal control. If, for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

III

In conclusion it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control—namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decisionmaking a reality for *all* Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued

[97] See n. 98, *infra*.

interdistrict wealth discrimination inherent in the present property tax. Both centralized and decentralized plans for educational funding not involving such interdistrict discrimination have been put forward.[98] The choice among these or other alternatives remains with the State,

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[98] Centralized educational financing is, to be sure, one alternative. On analysis, though, it is clear that even centralized financing would not deprive local school districts of what has been considered to be the essence of local educational control. See *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 477–478 (1972) (BURGER, C. J., dissenting). Central financing would leave in local hands the entire gamut of local educational policymaking—teachers, curriculum, school sites, the whole process of allocating resources among alternative educational objectives.

A second possibility is the much discussed theory of district power equalization put forth by Professor Coons, Clune, and Sugarman in their seminal work, Private Wealth and Public Education 201–242 (1970). Such a scheme would truly reflect a dedication to local fiscal control. Under their system, each school district would receive a fixed amount of revenue per pupil for any particular level of tax effort regardless of the level of local property tax base. Appellants criticize this scheme on the rather extraordinary ground that it would encourage poorer districts to overtax themselves in order to obtain substantial revenues for education. But under the present discriminatory scheme, it is the poor districts who are already taxing themselves at the highest rates, yet are receiving the lowest returns.

District wealth reapportionment is yet another alternative which would accomplish directly essentially what district power equalization would seek to do artificially. Appellants claim that the calculations concerning state property required by such a scheme would be impossible as a practical matter. Yet Texas is already making far more complex annual calculations—involving not only local property values but also local income and other economic factors—in conjunction with the Local Fund Assignment portion of the Minimum Foundation School Program. See V Texas Governor's Committee Report 43–44.

A fourth possibility would be to remove commercial, industrial, and mineral property from local tax rolls, to tax this property on a state-wide basis, and to return the resulting revenues to the local

not with the federal courts. In this regard, it should be evident that the degree of federal intervention in matters of local concern would be substantially less in this context than in previous decisions in which we have been asked effectively to impose a particular scheme upon the States under the guise of the Equal Protection Clause. See, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); cf. *Richardson* v. *Belcher*, 404 U. S. 78 (1971).

Still, we are told that this case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." *Ante*, at —. Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control."

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the school children of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the

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districts in a fashion that would compensate for remaining variations in the local tax bases.

None of these particular alternatives are necessarily constitutionally compelled; rather, they indicate the breadth of choice which remains to the State if the present interdistrict disparities were eliminated.

" See n. 98, *supra*.

status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.[100]

I would therefore affirm the judgment of the District Court.

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[100] Of course, nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions. See *Milliken* v. *Green*, — Mich. —, — N. W. 2d — (1972); *Robinson* v. *Cahill*, 118 N. J. Super. 223, 287 A. 2d 187, 119 N. J. Super. 40, 289 A. 2d 569 (1972); cf. *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 P. 2d 1241, 96 Cal. Rptr. 601 (1971).

APPENDIX I TO OPINION OF MARSHALL, J., DISSENTING

REVENUES OF TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES AND SOURCE OF FUNDS*

CATEGORIES† Market Value of Taxable Property Per Pupil	Local Revenues Per Pupil	State Revenues Per Pupil	State and Local Revenues Per Pupil (Columns 1 and 2)	Federal Revenues Per Pupil	Total Revenues Per Pupil (State-Local-Federal, Columns 1, 2 and 4)
Above $100,000 (10 Districts)	$610	$205	$815	$ 41	$856
$100,000–$50,000 (26 Districts)	287	257	544	66	610
$50,000–$30,000 (30 Districts)	224	260	484	45	529
$30,000–$10,000 (40 Districts)	166	295	461	85	546
Below $10,000 (4 Districts)	63	243	305	135	441

*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

†Prepared on the basis of a sample of 110 selected Texas School Districts from data for the 1967–1968 school year. Based on Table V to affidavit of Joel S. Berke, App., at 208.

APPENDIX II TO OPINION OF MARSHALL, J., DISSENTING

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES, EQUALIZED TAX RATES, AND YIELD OF RATES*

CATEGORIES† Market Value of Taxable Property Per Pupil	EQUALIZED TAX RATES ON $100	YIELD PER PUPIL (Equalized Rate Applied to District Market Value)
Above $100,000 (10 Districts)	$ .31	$585
$100,000–$50,000 (26 Districts)	.38	262
$50,000–$30,000 (30 Districts)	.55	213
$30,000–$10,000 (40 Districts)	.72	162
Below $10,000 (4 Districts)	.70	60

*Source: Policy Institute, Syracuse University Research Corporation, Syracuse, N. Y.

†Prepared on the basis of a sample of 110 selected Texas School Districts from data for the 1967–1968 school year. Based on Table II to affidavit of Joel S. Berke, App., at 205.

APPENDIX III TO OPINION OF MARSHALL, J., DISSENTING

SELECTED BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUATION AND SELECTED INDICATORS OF EDUCATIONAL QUALITY [1]

Selected Districts From High to Low by Market Valuation Per Pupil [2]	Professional Salaries Per Pupil [3] Per Cent	Teachers With [4] College Degrees	Masters Degrees	Per Cent of Total Staff With Emergency Permits [5]	A Student Counselor Ratios [6]	Professional Personnel Per 100 Pupils
ALAMO HEIGHTS	$372.00	100%	40%	11%	645	4.80
NORTH EAST	288.00	99	24	7	1,516	4.50
SAN ANTONIO	251.00	98	29	17	2,320	4.0
NORTH SIDE	258.00	99	20	17	1,493	4.30
HARLANDALE	243.00	94	21	22	1,800	4.00
EDGEWOOD	209.00	96	15	47	3,098	4.06

[1] Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

[2] Prepared on the basis of a sample of six selected school districts located in Bexar County, Texas, from data for the 1967–1968 school year.

[3] Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

[4] U. S. District Court, Western District of Texas, San Antonio Division, *Answers to Interrogatories,* Civil Action No. 68–175–SA.

[5] *Ibid.*

[6] *Ibid.*

Based on Table XI to affidavit of Joel S. Berke, App., at 220.

APPENDIX IV TO OPINION OF MARSHALL, J., DISSENTING

BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS RANKED BY EQUALIZED PROPERTY VALUE AND TAX RATE REQUIRED TO GENERATE HIGHEST YIELD IN ALL DISTRICTS*

Districts Ranked from High to Low Market Valuation Per Pupil†	Tax Rate Per $100 Needed to Equal Highest Yield
ALAMO HEIGHTS	$ .68
JUDSON	1.04
EAST CENTRAL	1.17
NORTH EAST	1.21
SOMERSET	1.32
SAN ANTONIO	1.56
NORTH SIDE	1.65
SOUTH WEST	2.10
SOUTH SIDE	3.03
HARLANDALE	3.20
SOUTH SAN ANTONIO	5.77
EDGEWOOD	5.76

*Policy Institute, Syracuse University Research Corporation, Syracuse, New York.

†Prepared on the basis of the 12 school districts located in Bexar County, Texas, from data from the 1967–1968 school year.

Based on Table IX to Affidavit of Joel S. Berke, App., at 218.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-1332

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees

PETITION FOR REHEARING

THE TEXAS SYSTEM ASSURES NO MINIMUM

Plaintiffs plead and proved that the Minimum Foundation Program does not *assure* any minimum educational program. Defendants were challenged throughout the litigation to show what minimum is assured. Defendants made no attempt to answer that challenge until they filed the REPLY BRIEF FOR APPELLANTS. At pages 15-16 of that brief, Defendants for the first time stated what they claim to be the minimum. Defendants recognize therein that the program only *allots* teachers and supportive personnel. The Court, however, has been misled into taking the position that these teachers and other supportive personnel are *assured*. The Court states the following:

> "The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher - compensated at the state-supported mini-

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mum salary - for every 25 students. Each school district's other supportive personnel are provided for: one principal for every 30 teachers; one 'special service' teacher - librarian, nurse, doctor, etc. for every 20 teachers; superintendents, vocational instructors, counselors, and educators for exceptional children are also provided."

The Court is factually in error, and the error is fundamental. The Texas system does not assure a single teacher. The Minimum Foundation Program sets minimum salaries and provides allotments, for example, of one teacher for every 25 students. However, each district is "free" to pay any salary above that minimum and hire any number of teachers above that statutory allotment. Edgewood cannot pay salaries comparable to those paid by the other school districts. Teachers go to the better paying school districts. As a consequence Edgewood does not get sufficient qualified teachers to meet the alloted ratio of one teacher for every 25 students. (A. 237; Cardenas Deposition, p. 9). The statistics consistently proved that Edgewood is not assured and does not have one teacher for every 25 students (for example, A. 237), or any other minimum alloted personnel.

By the statutory allotment, the State has prescribed what it believes to be a minimum quantitative standard of teachers and other supportive personnel. Professional unit allotments are contingent upon the employment of qualified personnel, and upon the payment of not less than the minimum salary as prescribed in Sec. 16. Texas Education Code, Sec. 16.11(b). If the school is not able to provide the teacher, it does not get the Foundation funds. (Graham Deposition, p. 76). In operation, the State system precludes Edgewood from ever achieving what the State prescribes as a minimum.

The same problem arises with the regional media and service centers related to by the Defendants in their Reply Brief and prescribed in the Texas Education Code. Sec. 11.32 and Sec. 11.33. In order to participate in the program, the school district must put up matching funds under Sec. 11.32 (k). Edgewood does not have the matching funds, and therefore is entirely precluded from participating in this program. (A. 238).

TEXAS FACTS SHOULD DECIDE TEXAS CASE

The Court cites statistics from other states for the proposition that the poor do not reside in poor districts. As Mr. Justice Rehnquist stated in oral argument, Plaintiffs should be entitled to stand on the record in Texas. In the case of *West Orange-Cove Con. I.S.D. v. County Bd. of School Tr.*, 430 S.W. 2d 65 (Tex. Civ. App. 1968) ref. n.r.e., it is illustrated that in Texas the poor are helpless. The Orange Independent School District was the big majority district. West Orange-Cove Consolidated Independent School District was a poor area that Orange did not seek to have as a part of its school system. After World War II, large refineries were built in the West Orange-Cove Consolidated Independent School District. The anomaly occurred: the poor people lived in a rich school district.

The Texas system may allow this to occur, but the system provides ways to prevent its continuance. The usual method of consolidating districts is for the majority in both districts to vote for consolidation. (A. 55). Rich districts do not vote to consolidate with poor districts. In Texas, there is a special method only for those in power. The Orange District dissolved itself and let the County Board of School Trustees attach it to the West Orange District. In the next election, it was a simple matter to completely take over the district, its funds and its control.

PUBLIC SCHOOL ATTENDANCE IS MANDATORY

The Court noted the importance of education. It is emphasized in Texas by the fact that every constitution of the State has mandated State-financed public schools. The Court did not address itself to the fact that the State mandates the child to go to public school. (Texas Education Code, Sec. 21. 032). The child has no choice. Without any process of law and without any right to choose, children are imposed upon by the State with an obligation to participate in a system that unjustly discriminates against them.

The State can make education mandatory. If the State does this, is it not bound to make it available on equal terms? Under the present Texas system, it is education for some

and punishment for others. The Fourteenth Amendment gives no substantive rights, but it is the safeguard against State imposed discrimination.

THIS CASE SHOULD BE REMANDED

Alternatively, Plaintiffs pray that the Court remand this case to the Trial Court. Plaintiffs prayed alternatively in their Complaint (A. 28) that the Court order that the Defendant school districts in Bexar County be abolished, and that the County School Trustees be convened to establish the new boundary lines for a school district or districts, and that the Court order that the lines be drawn so that the property values in each of the resulting school districts be approximately equal with regard to value of taxable property per school child. The Defendants gave no rational reason for the school district boundary lines, agreed that there are no natural geographic reasons for their existence, and agreed that district boundary lines serve no educational function. (Graham Deposition, p. 41; Edgar Deposition, p. 8; A. 53). The Trial Court should be allowed to make a decision on granting such alternative relief.

Respectfully submitted,

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